IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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No. 75-1628

MARILYN THRELKELD, *et al.*,

Appellants,

v.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

JURISDICTIONAL STATEMENT

Marilyn Threlkeld and Daniel Hanka appeal from the judgment of the Supreme Court of Minnesota, entered on 11 February, 1976, which sustained against a federal constitutional due-process challenge that provision of the Minnesota Public Employment Labor Relations Act of 1971 which permitted labor organizations designated as exclusive-bargaining representatives to require public employers to deduct so-called "fair-share" fees from the wages of nonunion employees, and to transmit those fees to the requesting organizations, without prior notice or hearing.

THE OPINIONS BELOW

The opinion of the District Court for Hennepin County, Minnesota, (Appendix* A, pp. 1a-20a) is unofficially reported at 90 L.R.R.M. 2702. The opinion of the Supreme Court of Minnesota (App. B, pp. 1b-17b) is reported at _____ Minn._____, 239 N.W.2d 437.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This proceeding was brought by Marilyn Threlkeld and Daniel Hanka, employees of Independent School District 281, Robbinsdale, Minnesota, who sought a declaratory judgment pursuant to Minnesota Statutes c. 555 that the so-called "fair-share-fee" provision of the Minnesota Public Employment Labor Relations Act of 1971 (hereinafter "PELRA"), Minnesota Statutes § 179.65, subd. 2, was repugnant on its face and as applied to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Under color of the "fair-share" provision, the Robbinsdale Federation of Teachers, Local 872, has required the School District to deduct from said employees' wages and transmit to Local 872 a fee the amount of which Local 872 unilaterally determined. In their amended complaint, the employees alleged that they had received no notice of, and had been afforded no opportunity to be heard prior to, the taking. They further alleged that such a procedure deprived them of rights secured by the Fourteenth Amendment. On 13 August, 1975, the

*Hereinafter "App." All Appendix references herein are to the appendices printed as attachments to this Statement, *infra*.

District Court of Hennepin County, Minnesota, issued an order and memorandum opinion granting the employees' motion for summary judgment, and holding the "fair-share" provision repugnant to the Due Process Clause of the Fourteenth Amendment. (App. A, pp. 1a-20a) The District Court issued an order for entry of judgment on 22 August, 1975. (App. A, pp. 21a-23a) And judgment was entered on 25 August, 1975. (App. A, pp. 24a-25a) On appeal, the Supreme Court of Minnesota issued an opinion on 23 January, 1976, and entered a judgment on 11 February, 1976, reversing the District Court, and holding the "fair-share" provision valid under the Constitution of the United States. (App. B, pp. 1b-17b, 18b)

The judgment or decree of which the employees seek review is the opinion and judgment of the Supreme Court of Minnesota upholding the validity, on its face and as applied, of Section 179.65, subd. 2, of the PELRA. On 12 February, 1976, the employees filed their Notice of Appeal in the Supreme Court of Minnesota, the court in control of the record. (App. C, pp. 1c-2c)

This Court has jurisdiction of the appeal under Title 28 of the United States Code, Section 1257(2) (1970).

Cases supporting this Court's jurisdiction include: *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975); *Bantam Books, Inc v. Sullivan*, 372 U.S. 58, 61 n.3 (1963); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 159-60 (1954); *People* ex rel. *McCollum v. Board of Educ.*, 333 U.S. 203, 204-06 (1948); and *New York* ex rel. *Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

This appeal involves the validity under the United States Constitution of Minnesota Statutes Sections

179.65, subd. 2, 179.68, subds. 1, 3(1), and 179.76 which, at the time of the decision of the Supreme Court of Minnesota, provided in pertinent part as follows:

> Except for employees included in section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975 only, all public employees who are not members of the exclusive representative may be required by such representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures.

2 *Minnesota Statutes* § 179.65, subd. 2, at 2539 (1974).

> The practices specified in this section are unfair practices. Any employee, employer, employee or employer organization, exclusive representative, or any other person or organization aggrieved by an unfair practice as defined in sections 179.61 to 179.77 may bring an action in district court of the county wherein the practice is alleged to have occurred for injunctive relief and for damages caused by such unfair labor practice.

2 *Minnesota Statutes* § 179.68, subd. 1, at 2542 (1974).

> Employee organizations, their agents, or representatives, and public employees are prohibited from: restraining or coercing employees in the exercise of their rights as provided in sections 179.61 to 179.77.

2 *Minnesota Statutes* § 179.68, subd. 3(1), at 2542 (1974).

> It shall be the public policy of the state of Minnesota that every public employee should be provided with the right of independent review, by a disinterested person or agency, of any grievance arising out of the interpretation of or adherence to terms and conditions of employment. ployment.

2 *Minnesota Statutes* § 179.76, at 2549 (1974).

QUESTION PRESENTED BY THE APPEAL

Does Minnesota Statutes Section 179.65, subd. 2, violate the Due Process Clausc of the Fourteenth Amendment where, as construed and applied by the Minnesota Supreme Court, it:

1. Authorizes a union, as the exclusive-bargaining representative of nonunion public employees, to obligate their employer to deduct from their wages and to transmit to the union a fee for services purportedly rendered to them in the negotiation of collective agreements and the adjustment of grievances,

   a. Without requiring the union to give notice to the affected employees of any more than the amount of the fee and the union 's request for its deduction; and

b. Without affording the affected employees a pre-deduction hearing on whether the amount of the fee exceeds that permitted under the statutory formula;

2. Requires the nonunion public employees from whose wages deductions have been made to initiate independent suits in state court in order to be heard on whether the amount of the fee exceeds that permitted under the statutory formula; and

3. Prohibits those employees from obtaining injunctive relief against further takings unless they bear the burden of proof that the amount of the takings will be clearly excessive under the statutory formula?

STATEMENT OF THE CASE

Appellant Marilyn Threlkeld is an educational aide employed by Independent School District 281, Robbinsdale, Minnesota. She is not a member of any public-employee labor organization. She is, however, a member of a bargaining unit of educational aides for which Appellee Robinsdale Federation of Teachers, Local 872, has been certified as the exclusive representative. Appellant Daniel Hanka is a professional employee of the School District. He is not a member of any public-employee labor organization, but does belong to a bargaining unit of teachers for which Local 872 is the exclusive representative. Local 872 is an employee organization whose members are some, but not all, of the employees of the School District.

At a meeting of its general membership held in May, 1974, Local 872 voted to require a "fair-share"

contribution from all employees not members of the Federation in bargaining units for which it was the exclusive representative. Subsequently, Local 872 unilaterally determined the amount of the "fair share" to be paid by each such employee including Threlkeld and Hanka. Before September, 1974, Local 872 notified the School District of its decision to require "fair-share" contributions from Threlkeld. Accordingly, under color of Minnesota Statutes § 179.65, subd. 2, the School District in September, 1974, began regularly to deduct and transmit to Local 872 a portion of Threlkeld's salary. Threlkeld first became aware of the "fair-share" deductions through her own analysis of her first September, 1974, payroll check. In December, 1974, Local 872 notified the School District of its decision to require "fair-share" contributions from Hanka beginning 1 January, 1975. Accordingly, the School District, under color of Minnesota Statutes § 179.65, subd. 2, began regularly to deduct and transmit to Local 872 a portion of Hanka's salary.

At no time before commencement of the wage deductions did either Local 872 or the School District provide Threlkeld or Hanka with notice of or an opportunity for a hearing with respect to the required "fair-share" contributions. Local 872 informed Hanka by letter dated 17 December, 1974, that "fair-share" deductions would be made from his salary from 1 January, 1975. But it did not so inform Threlkeld. Prior to the filing of the complaint in this case, no court or other independent, impartial agency of the State of Minnesota authorized or otherwise reviewed either the decision of Local 872 to require "fair-share" contributions, or the validity of its calculation of the amount of such contributions legally chargeable to

Threlkeld and Hanka under color of the formula for determining such amounts set out in Minnesota Statutes § 179.65, subd. 2. Prior to the filing of the complaint in this case, no court or other independent, impartial agency of the State of Minnesota provided either Threlkeld or Hanka with an opportunity for a hearing at which they might challenge the legality of the "fair-share" fees deducted by the School District and transmitted to Local 872. At no time has Local 872 rendered an accounting either to Threlkeld or to Hanka of its use of the fees deducted from their wages.

On 11 December, 1974, Threlkeld and Hanka filed their amended complaint for declaratory judgment in the District Court of Hennepin County, Minnesota, against Local 872 and the School District. They alleged *inter alia* that the "fair-share" provision of the PELRA, on its face and as applied by Local 872 and the School District, was repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. On the basis of written requests for admissions establishing the facts detailed above, the parties each moved for summary judgment.

The District Court granted summary judgment for Threlkeld and Hanka on 13 August, 1975. In its memorandum opinion the Court specifically held

> that due process concepts require notice to be given and an opportunity to be heard afforded to school employees before a fair share fee can be assessed by the exclusive representative and withheld from their earnings. Here no such notice and hearing were provided. Nor did the fair share provisions of PELRA require such to be given. The conclusion thus is inescapable that * * * the individual plaintiffs were deprived of money which

> was their property without due process of law. That taking was unconstitutional as is the statutory provision pursuant to which it was done. (App. A at 19a-20a)

On appeal, the Supreme Court of Minnesota reversed. In its opinion of 23 January, 1976, the Court held the PELRA "fair-share" provision valid under the Due Process Clause of the Fourteenth Amendment. It stated

> that PELRA should be construed to provide that the public employee has (a) the right to notice of the amount of an impending fair share fee which is to be deducted from his earnings; (b) the right to bring an action in district court to enjoin the use of the withheld fee; (c) the right, under certain exigent circumstances, to have the collection of the fair share fee enjoined; and (d) the right, in all circumstances and upon proper application, to a court hearing on the validity and proper amount of the fair share fee. We have concluded, however, that, in the absence of unusual circumstances, the hearing and final judicial determination of the fee's validity may follow the actual withholding of the fair share fee from the employee's paycheck. (App. B at 7b-8b)

Threlkeld and Hanka bring this appeal seeking reversal of the judgment of the Supreme Court of Minnesota.

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

This appeal squarely presents the question of whether Local 872, acting as an exclusive-bargaining representative under color of the Minnesota Public Employment Labor Relations Act of 1971 may seize and expend

portions of nonunion employees' wages without affording them notice and a prior hearing of some kind on the validity of its claim that the monies seized constitute no more than the limited "pro rata share of the specific expenses incurred for services rendered by [Local 872] in relationship to negotiations and administration of grievance procedures", as required by Minnesota Statutes Section 179.65, subd. 2 at the time of the decision of the Minnesota Supreme Court.

In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), this Court held that garnishments of an employee's wages and of a corporate bank account under color of state law and without notice and a prior hearing of some kind violate the Due Process Clause of the Fourteenth Amendment. The principles of *Sniadach* and *North Georgia Finishing* are directly applicable here because Minnesota Statutes Section 179.65, subd. 2 is, on its face and as applied, a wage-garnishment scheme in fact (if not in name). And "the Constitution is concerned with the practical consequences, not the formal categorizations, of state law." *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *accord, St. Louis S.W.R.R. v. Arkansas* ex rel. *Norwood*, 235 U.S. 350, 362 (1914). Moreover, the principles of procedural due process enunciated in those decisions clearly apply where public employees are concerned. For public employment, as this Court has repeatedly held, cannot be conditioned on the "waiver" or surrender of any constitutionally guaranteed right, power, privilege, or immunity – including the right not to be deprived of either liberty or property without due process of law. *E.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Board of Regents v. Roth*, 408 U.S. 564,

571 & n.9 (1972); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 379-80 (1964); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 288 (1961); *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960).

This Court has never passed on the precise issue of whether a public-employee union, acting as an exclusive representative under color of state law, has a duty arising out of the Constitution to afford nonunion employees procedural-due-process protections when it purports to exact compulsory "service" fees from those wage earners. But, in addition to the more general teaching of *Sniadach* and *North Georgia Finishing*, it has indicated in the special context of private-sector labor relations that an exclusive representative has a duty not unlike that which the Constitution imposes on state agencies "to give [nonunion employees] notice of and opportunity for hearing on its proposed action." *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 204 (1944).

In its decision sustaining the validity of the Minnesota "fair-share" scheme against attack under the Due Process Clause of the Fourteenth Amendment, the Minnesota Supreme Court failed to follow, or correctly to apply, this Court's controlling precedents in the area of procedural due process.

I.

The Minnesota Supreme Court Erroneously Ruled That the PELRA "Fair-Share" Scheme Satisfied the Due Process Clause of the Fourteenth Amendment Because It Implicitly Required Local 872 Merely to Inform Threlkeld and Hanka of the Amount and Pendency of the Deductions From Their Wages.

The Minnesota Supreme Court construed the PELRA "fair-share" scheme "to provide that the [dissenting] public employee has * * * the right to notice *of the amount of an impending fair share fee which is to be deducted from his wages* * * *." (App. B at 7b) (emphasis supplied). The decisions of this Court teach, however, that *constitutional* "notice" is *not* the mere information that one is to be deprived of liberty or property in fact, but rather notice *of a hearing of some kind* at which the validity of the deprivation will be put in issue. *Constitutional* "notice" must be "reasonably calculated, under all circumstances, to apprise interested parties *of the pendency of the action and afford them an opportunity to present their objections.*" *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis supplied). For *constitutional* "notice" is integrally related to the hearing required by the Fourteenth Amendment; each is a necessary element in a coherent process of protection for individual liberty and property against unwarranted interference by government with their exercise and enjoyment. The "right to be heard has little reality or worth unless one is informed *that the matter is pending* and can choose for himself whether to appear or default, acquiesce or

contest." *Id.* (emphasis supplied). Similarly, the right to notice has no constitutional significance unless it implies notice in the sense of "information, an advice, or written warning, in more or less formal shape, *intended to apprise a person of some proceeding in which his interests are involved* * * *." *Black's Law Dictionary* 1210 (rev. 4th ed. 1968) (emphasis supplied).

The Minnesota Supreme Court ignored this intimate constitutional relation between notice and hearing. Its construction of the PELRA "fair-share" scheme unnaturally, illogically, and unconstitutionally severs and perverts these two elements. While it permitted Local 872 to set in motion statutory machinery to garnish dissenting employees' wages and to cause the monies seized to be transmitted to the union for its unrestricted and unsupervised use, the Minnesota Court required that Local 872 merely inform nonunion employees of the taking and its amount. To be sure, it "permitted" Threlkeld and Hanka themselves to institute a separate lawsuit in state court to contest the validity of the taking; but implicit in this right to sue is the correlative duty to give notice to Local 872 of the court proceedings. Thus, the effect of the Minnesota Court's decision is *to give Local 872 the right to notice (and hearing) before it can be deprived of the possession and use of monies which it has caused to be seized, without notice (and hearing), from Threlkeld and Hanka.*

This result stands the Due Process Clause of the Fourteenth Amendment on its head, and goes beyond even the garnishment statutes struck down in *Sniadach* and *North Georgia Finishing.*

II.

The Minnesota Supreme Court Erroneously Ruled That the PELRA "Fair-Share" Scheme Satisfied the Due Process Clause of the Fourteenth Amendment, Even Though It Did Not Require Local 872 To Initiate a Hearing Procedure and Even Though It Did Not Provide for a Pre-Garnishment Hearing, Because Other Provisions of the Act Permit Threlkeld and Hanka to Institute an Independent Lawsuit to Challenge the Seizure and Expenditure of the Fees.

The Minnesota Supreme Court correctly identified the central issue in this case as "whether the fair share statute passes constitutional muster *when neither it nor any of the other provisions of PELRA specifically provides for a hearing* prior *to the imposition of the fair share fee upon nonmembers of* [*Local 872*]." (App. B at 5b) (emphasis supplied) It erroneously concluded, however, that under the instant circumstances procedural due process required neither a *prior* hearing, nor, indeed, even *any* hearing *initiated by Local 872* – but was satisfied because Threlkeld and Hanka might bring an independent lawsuit under another provision of the PELRA and thereby avail themselves of an *ex post facto* remedy.

> [W]e have concluded that the imposition upon a nonmember employee of a fair share fee which is not consistent with the provisions of the statute constitutes an unfair labor practice. Therefore, pursuant to § 179.68, subd. 1, a public employee aggrieved may bring an action in district court for injunctive relief. Further, as we construe the statute, the district court, at the request of either

> party, may determine the validity and proper amount of the fair share fee.
>
> In such an action, the district court shall, at the request of the complaining party, enjoin the *use* of the disputed fees until the exclusive representative establishes to the satisfaction of the district court the validity and correctness of the fee under the statutory formula * * *. Further, the district court may, in the exercise of its sound and cautiously exercised discretion, enjoin the *collection* of such fees if it is persuaded by the complaining party that the amount of the fee and the circumstances surrounding its assessment clearly indicate that the fee is invalid because it is so excessive that it is punitive or oppressive when measured against the statutory formula, or for any other reasons which clearly contravene the statute.
>
> * * * We have concluded, however, that in the absence of unusual circumstances, the hearing and final judicial determination of the fee's validity may follow the actual withholding of the fair share fee from the employee's paycheck.

(App. B at 6b-8b) Again, the Minnesota Court's decision stands the Due Process Clause on its head.

The decisions of this Court teach that, in the absence of extraordinary circumstances, procedural due process requires a *prior* hearing initiated by the alleged creditor and "aimed at establishing the validity, or at least the probably validity, of the [creditor's] underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use." *Sniadach*, 395 U.S. at 343 (Harlan, J., concurring). In *Sniadach*, the challenged wage-garnishment statute required the alleged creditor to set in motion a judicial hearing procedure, and to notify the alleged debtor of the taking and of the future hearing within ten days. Moreover, the taking

served only to *freeze* the wages pending a judicial determination of the underlying claim. None the less, this Court found the garnishment scheme constitutionally impermissible because: (i) it deprived the alleged debtor of the *use* and *enjoyment* of her earned wages without a hearing on the validity of the taking; (ii) it found no justification in any extraordinary circumstances "requiring special protection to a state or creditor interest"; and (iii) it was not narrowly drawn to meet such circumstances. *Id.* at 338-39 (opinion of the Court); 342-43 & n. (opinion of Harlan, J., concurring).

The principles of *Sniadach* control this case. Under the PELRA "fair-share" garnishment scheme, Local 872 was not required to set in motion any judicial machinery leading to a mandatory hearing on the validity of its claims against Threlkeld and Hanka. Indeed, as construed by the Minnesota Court, the statute required precisely the opposite procedure – imposing upon the aggrieved employees the burden of instituting a court action to recover possession of their own wages. Secondly, under the PELRA scheme, the garnishments did not result in a mere freezing of monies deducted from the employees' wages – but in the transfer of those monies to Local 872, for its unrestricted and unsupervised use. Thirdly, the PELRA scheme, as construed and applied in this case, was not justified by and was not limited to "extraordinary situations". To be sure, the Minnesota Court purported to "balance" the interests of Threlkeld and Hanka in the continued use and enjoyment of their wages against the State's interest in promoting the "financial stability" of Local 872. This, however, was an illegitimate application of the "balancing" test. Except

in a narrow class of cases already recognized by this Court, the "balancing" test is appropriately employed to determine only what *form of hearing* is necessary before the State may effect some deprivation of liberty or property, not whether the hearing should precede or follow the deprivation. *See, e.g., Mathews v. Eldridge,* ____ U.S. ____, ____, 47 L.Ed.2d 18, 32-33 (1976). And this case does not present a set of circumstances falling either within the class of cases where a hearing may constitutionally follow the deprivation or within a new exception to the rule of prior hearing. For the "financial-stability" argument upon which the Minnesota Court seized is a logical fallacy constitutionally incompetent to support *any* governmental action, let alone a deprivation of procedural due process. Therefore, the "fair-share" scheme exhibits each of the infirmities which this Court held in *Sniadach* were fatal to the constitutional validity of a wage-garnishment procedure. And on that basis alone the Minnesota Court should have declared it unconstitutional on its face and as applied.

The Minnesota Court attempted, throughout its opinion, to rationalize its denial of procedural due process by reference to an assumed distinction between the *collection* of "fair-share" fees and their *use* by Local 872. Thus it held that an aggrieved employee might obtain an injunction against the *use* of those monies "until the exclusive representative establishes to the satisfaction of [a Minnesota] district court the validity and correctness of the fee under the statutory formula", but that a court should not enjoin *collection* of the fees unless "it is persuaded by the complaining party that the amount * * * and the circumstances

surrounding its assessment clearly indicate that the fee is invalid because it is so excessive that it is punitive or oppressive when measured against the statutory formula, or for other reasons clearly contravene the statute." (App. B at 7b) This purported dichotomy between collection and use, however, is without constitutional substance. *Sniadach* clearly holds that the mere *collection* – *i.e.*, the garnishment and freezing of wages – is subject to scrutiny under the Due Process Clause. *Sniadach* does *not* say that a collection of monies under color of right is valid unless the garnishee can demonstrate that it is clearly "punitive" or "oppressive"; for the substantial right protected by the Due Process Clause is the *interim use and enjoyment* of the wages, and not merely their ultimate possession. That being so, the purported distinction between collection and use advanced by the Minnesota Court must fail.

III.

The Minnesota Supreme Court Failed to Recognize That, in the Special Context of Public Employment, Procedural Due Process Must Meet Exacting First Amendment Standards.

The Minnesota Supreme Court "stressed that the procedural protection to which an individual is constitutionally entitled depends on the balancing of interests in each particular case." (App. B at 15b) It failed, however, properly to identify and balance the interests involved where public-employee unions, on

their own motion, seize and expend portions of dissenting employees' wages without prior judicial supervision. For it failed to take into account the unique factual setting of this case: namely, its public-employment context.

Nothing is more clear than that, because public-sector labor relations are an inextricable part of the political process, public-employee unions are deeply and unavoidably involved in various forms of political activism. This fact is so notorious, as to warrant judicial notice of the *inherently political* nature of public-sector unions. *E.g.*, Blair, "Union Security Agreements in Public Employment", 60 *Corn. L. Rev.* 183, 194-96 (1975); Petro, "Sovereignty and Compulsory Public-Sector Bargaining", 10 *Wake Forest L. Rev.* 25 (1974); Summers, "Public Employee Bargaining: A Political Perspective", 83 *Yale L.J.* 1156 (1974); Love & Sulzner, "Political Implications of Public Employee Bargaining", 11 *Ind. Rel.* 18, 19-20 (1972); Siegal & Kainen, "Political Forces in Public Sector Collective Bargaining", 21 *Catholic L. Rev.* 581, 583, 585 (1972); D. T. Stanley, *Managing Local Government Under Union Pressure* 19 (1972); Burton & Krider, "The Role and Consequences of Strikes by Public Employees", 79 *Yale L.J.* 418, 428-32 (1970); Wellington & Winter, "Structuring Collective Bargaining in Public Employment", 79 *Yale L.J.* 805, 808, 847-52 (1972). Moreover, the inherently political nature of public-sector unions and public-sector collective bargaining draws into serious question the constitutionality under the First and Fourteenth Amendments of compelling dissenting employees to finance the activities of such unions in any degree. But even if it were possible, which Threlkeld and Hanka deny, to imagine a category

of union activity "on behalf of" dissenting public employees which does *not* raise First Amendment questions, none the less the strong likelihood that those unions do in fact expend coerced fees on political activities in violation of dissenters' freedoms counsels this Court to scrutinize with the utmost care the procedures whereby the unions seize and expend portions of dissenters' wages under color of state law.

Again and again, this Court has imposed strict procedural standards where First Amendment issues were concerned. Its decisions teach that a statutory scheme which *even potentially* threatens to restrain First Amendment liberty must rest the burden of proof on the party seeking the restraint, rather than on the party threatened with deprivation of his liberty; must not be capable of being administered so as to lend an effect of pre-judgment finality to the restraining party's determination; must assure the most prompt judicial review possible to minimize any "chilling" effect upon the exercise of fundamental freedom; and must provide for governmentally initiated judicial participation at every critical stage in the process. *Blount v. Rizzi*, 400 U.S. 410, 418-18 (1971); *Freedman v. Maryland*, 380 U.S. 51, 57-59 (1965); *Speiser v. Randall*, 357 U.S. 513 (1958); *Teitel Film Corp. v. Cusak*, 390 U.S. 139, 141-42 (1968); *Roth v. United States*, 354 U.S. 476, 481 (1957). The Minnesota "fair-share" scheme, as construed and applied by the Minnesota Supreme Court, did not meet these exacting requirements.

If public-employee unions such as Local 872 coerce "fair-share" payments from dissenting employees such as Threlkeld and Hanka and expend those payments on political and ideological activism connected to but not

constitutionally permitted by their status as those employees' exclusive representatives, they have irreparably injured the dissenters by imposing a prior restraint on their freedom *not to* speak, *not to* petition, and *not to* associate. *See Cort v. Ash*, ____ U.S. ____, ____, 95 S.Ct. 2080, 2091 (1975). The inherently political nature of such unions makes this sequence of events not only possible but also likely, absent pre-spending judicial intervention required by statute. As construed and applied here, however, "fair share" did not provide for governmentally initiated judicial participation in the critical stages of the wage-garnishment process, let alone in the process by which Local 872 determined what projects and programs it would finance with "fair-share" monies. This, in effect, lent pre-judgment finality to Local 872's unilateral determination that each particular expenditure, although arguably political in nature, comes within the statutory standard under the PELRA. Such pre-judgment finality is impermissible where First Amendment interests are at stake; and any state procedure which tolerates such finality is unconstitutional *per se*.

CONCLUSION

In sum, the Minnesota Supreme Court has failed to follow the leading decisions of this Court on procedural due process, and has created a precedent whereby the First and Fourteenth Amendment freedoms of countless public employees may be irremediably compromised. Such a decision cannot be permitted to stand. Rather, this Court should take jurisdiction and decide the

substantial federal constitutional questions involved, with the aid of full briefs and oral argument.

Respectfully submitted,

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APPENDIX A

Order and Memorandum Opinion of the District Court for the County of Hennepin, Minnesota dated 13 August, 1975

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

ROBBINSDALE EDUCATION ASSOCIATION, MARYILN THRELKELD, an individual, and DANIEL HANKA, an individual,

Plaintiffs,

vs. — File No. 710101

ROBBINSDALE FEDERATION OF TEACHERS LOCAL 872; and INDEPENDENT SCHOOL DISTRICT 281,

Defendants.

ORDER

The above-entitled matter came before the undersigned, one of the Judges of the above-named Court, at a General Term thereof, held in the Government Center, City of Minneapolis, Hennepin County, Minnesota, on July 9, 1975, pursuant to orders of the Honorable Douglas K. Amdahl, Chief Judge of this Court, dated May 13, 1975 and May 20, 1975.

Darel F. Swenson, Esq., appeared for and on behalf of the plaintiffs, and Roger A. Peterson, Esq., appeared for and on behalf of the defendant Robbinsdale Federation of Teachers Local 872. Bernard G. Zimpfer, Esq., appeared for and on behalf of Independent School District 281.

The matter presented to the Court for its determination is the constitutionality of the fair share provisions of the Public Employment Labor Relations Act of 1971, Minn. Stat., § 179.65, subd. 2. The matter was submitted to the Court upon the Amended Request for Admissions of Fact and of Genuineness of Documents served by counsel for the plaintiffs on defendant Robbinsdale Federation of Teachers Local 872, Robbinsdale Federation of Teachers' Acceptance of Statement of Admissions filed by its counsel, written briefs, and oral argument.

For purposes of this order and the accompanying memorandum, which by reference thereto is specifically incorporated herein, the following statutory definitions are applicable:

1. " 'Public employer' or 'employer' means and includes school districts and their respective representatives." Minn. Stat., § 179.63, subd. 4.

2. " 'Employee organization' means any union or organization of public employees whose purpose is, in whole or in part, to deal with public employees concerning grievances and terms and conditions of employment." Minn. Stat., § 179.63, subd. 5.

3. " 'Exclusive representative' means an employee organization which has been designated by a majority of those votes cast in the appropriate unit and has been certified pursuant to section 179.67." Minn. Stat., § 179.63, subd. 6.

4. A teacher is deemed to be a professional employee. Minn. Stat., § 179.63, subd. 10 (c).

5. " 'Appropriate unit' or 'unit' means a unit of employees, excluding supervisory employees, confidential employees and principals and assistant principals, as determined pursuant to section 179.71, subdivision 3, and in the case of school district, the term means all teachers in the district." Minn. Stat., § 179.63, subd. 17.

Upon the Amended Request for Admissions filed by plaintiffs and the acceptance thereof by defendant Robbinsdale Federation of Teachers, hereinafter designated "Federation," the Court MAKES THE FOLLOWING:

FINDINGS OF FACT

1. Plaintiff Robbinsdale Education Association, hereinafter designated "Education Association," is an employee organization, the members of which are professional employees employed by Independent School District 281, hereinafter designated "School District."

2. Plaintiff Marilyn Threlkeld is a non-professional public employee who is employed by the school district as an educational aide. She is not a member of any employee organization.

3. Plaintiff Daniel Hanka is a professional employee of the school district but is not a member of any employee organization.

4. The defendant Federation is an employee organization whose members are some of the employees of the school district. It is the designated exclusive

representative of the collective bargaining unit of certain public employees of the school district.

5. The members of the Education Association and plaintiffs Threlkeld and Hanka are members of separate bargaining units which are represented by the defendant Federation. Plaintiff Threlkeld is a member of the educational aides' bargaining unit, and plaintiff Hanka and members of the Educational Association are members of the certified teachers' bargaining unit.

6. At a meeting of its general membership held in May, 1974, the Federation voted to require a fair share contribution from all members of the bargaining unit represented by the Federation who are not members thereof.

7. Subsequently, the Federation budget committee, after consultation with the Federation treasurer, first determined the formula the Federation would use to fix the amount of the fair share contribution to be required by the Federation from each fair share payer. That contribution was determined to be the sum of $40.00 for each fair share payer.

8. The Federation notified the school district before September, 1974 of the Federation membership's decision to require fair share contributions from plaintiff Threlkeld and, accordingly, in September, 1974, the school district began to check off amounts to the Federation from her salary. Plaintiff Threlkeld became aware for the first time of the fair share check off when she noticed in her first September, 1974 payroll check analysis that a fair share contribution had been checked off and deducted from her regular payroll check payment.

9. In December, 1974, the Federation notified the school district of the Federation's membership decision

to require fair share contributions from the teachers, and also brought to the school district's attention its obligation to check off fair share contributions from the earnings of teachers pursuant to Minn. Stat., § 179.65, subd. 2. Accordingly, in January, 1975, the school district began checking off fair share contributions from the earnings of teachers who were not members of the Federation pursuant to the above specified section of the statutes. Among those persons subject to the fair share check-off for teachers are members of the Education Association and plaintiff Hanka.

10. No notice was given to plaintiff Threlkeld by the school district that check-offs for fair share contributions would commence at any time before the check-offs began in September, 1974.

11. Nor did the school district at any time before commencement of the check-offs give notice to plaintiff Threlkeld of the amount that would be checked off from her earnings.

12. At no time before commencement of the check-offs of fair share contributions from plaintiff Threlkeld's earnings did the school district give her an opportunity for a full, fair, and impartial hearing at which she could state her views concerning the check-offs and the amounts to be checked off.

13. At no time before commencement of the check-offs of fair share contributions of the earnings of the members of the Educational Association and plaintiff Hanka did the school district notify those persons that the check off would commence or of the amounts that would be checked off from their earnings.

14. At no time before the commencement of the check-offs of fair share contributions from the earnings

of the members of the Education Association and plaintiff Hanka did the school district provide them, or any of them, an opportunity for a full, fair, and impartial hearing at which they could state their views and possible objections concerning commencement of the check-off and amounts to be checked off.

15. In May, 1974, Joyce Morris, then president of the aides' unit, distributed a form letter to the aides employed by the school district inviting each of them to join the Federation and stating in part: "You will be charged a fair share fee anyway of $40.00 which is almost as much as $44.00 dues."

16. At no time before commencement of the check off of fair share contributions from plaintiff Threlkeld's earnings did the Federation give her an opportunity for a hearing at which she could state her objections to the commencement of the check-offs or the amounts to be checked off.

17. Before commencement of the check off of fair share contributions from the earnings of the members of the Education Association and plaintiff Hanka, the Federation by letter dated December 17, 1974, notified them that beginning January 1, 1975, fair share contributions would be checked off from their earnings and also what the amount of the fair share contributions would be.

18. At no time before commencement of the check off of fair share contributions from the earnings of the members of the Education Association and plaintiff Hanka, however, did the Federation give them, or any of them, an opportunity for a hearing at which they could state their views and possible objections to the check off of the fair shares of the contributions and to the amounts of the fair share contributions to be

checked off. The Federation treasurer did inform the Education Association's Cooper Senior High School building representative that he would be willing to attend a meeting to explain fair share.

19. The amount of the fair share contributions checked off from plaintiff's earnings was determined and certified by the Federation alone pursuant to Minn. Stat., § 179.65, subd. 2.

20. Neither the Federation's vote to require fair share contributions from the plaintiffs nor the validity of the Federation's calculation of the amount of the fair share contributions has been reviewed by a court or independent, impartial authority or agency.

21. The plaintiffs have not been given an opportunity for a hearing by any independent, fair, and impartial officer, agency or other authority regarding their objections to the check off from their earnings of fair share contributions or the amount of such check-offs.

22. The Federation has rendered no accounting to the fair share payers of the expenses incurred by the Federation in carrying out the Federation's institutional programs, including negotiations and the administration of grievance procedures.

CONCLUSIONS OF LAW

Upon the foregoing Findings of Fact, the Court CONCLUDES AS A MATTER OF LAW:

1. The assessment and check-off of a fair share fee in the manner described in the foregoing Findings of Fact without prior notice to the plaintiffs, or any of them, and an opportunity for a prior hearing is in violation of

due process of law and, therefore, unconstitutional under the Constitution of the State of Minnesota, Article I, section 7.

2. The assessment and check-off of a fair share fee in the manner described in the foregoing Findings of Fact without prior notice to the plaintiffs, or any of them, and an opportunity for a prior hearing is in violation of due process of law and, therefore, unconstitutional under the United States Constitution, Article XIV.

3. That portion of Minnesota Statutes, section 179.65, subdivision 2, which reads:

> "***Except for employees included in section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975 only, all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative***"

violates due process of law in that it makes no provision for notice and hearing prior to the determination of the fair share fee for services and is, therefore, unconstitutional under the Constitution of the State of Minnesota, Article I, section 7.

4. That portion of Minnesota Statutes, section 179.65, subdivision 2, which reads:

> "***Except for employees included in section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975 only, all public employees who are not members of the exclusive representative may be required by

> said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employee shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative***"

violates due process of law in that it makes no provision for notice and hearing prior to the determination of the fair share fee for services and is, therefore, unconstitutional under the Constitution of the United States, Article XIV.

ORDER

Upon the foregoing Findings of Fact and Conclusions of Law, the Court HEREBY MAKES ITS ORDER:

1. Determining and declaring that the assessment and check-off by the defendants of a fair share fee in the manner described in the foregoing Findings of Fact violates due process of law and is, therefore, unconstitutional under the Constitution of the State of Minnesota, Article I, section 7.

2. Determining and declaring that the assessment and check-off by the defendants of a fair share fee in the manner described in the foregoing Findings of Fact violates due process of law and is, therefore, unconstitutional under the Constitution of the United States, Article XIV.

3. Determining and declaring that the portion of Minnesota Statutes, section 179.65, subdivision 2 quoted in Conclusions of Law number 3 violates due process of law and is, therefore, unconstitutional under

the Constitution of the State of Minnesota, Article I, section 7.

4. Determining and declaring that the portion of Minnesota Statutes, section 179.65, subdivision 2 quoted in Conclusions of Law number 3 violates due process of law and is, therefore, unconstitutional under the Constitution of the United States, Article XIV.

BY THE COURT:

CRANE WINTON

Judge of District Court

Dated: August 13, 1975.

MEMORANDUM

By agreement of all parties to this action, the Court is required to determine whether the fair share provisions of the Public Employment Labor Relations Act of 1971 (PELRA), Minn. Stats., § 179.65, Subd. 2,[1] pass constitutional muster. For the reasons hereafter given, the undersigned must hold that they do not.

Generally, constitutional issues are met by a court only when ultimately necessary and then with great caution. *Head v. Special School District No. 1*, 288 Minn. 496, 505-506, 182 N.W. 2d 887 (1970). That precept, if literally followed in this case, might seem to indicate that the constitutional issue here considered

[1] Minn. Stats., § 179.65, subd. 2 provides:

"Subd. 2. Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. Public employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative for the purpose of negotiating grievance procedures and the terms and conditions of employment for such employees with the employer of such unit. Except for employees included in section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975 only, all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures."

should be deferred until all other issues of fact and law have been fully litigated and resolved in a process which could require months to complete even if it were accelerated. Another course, however, has been followed here for reasons which seem to the undersigned to be both compellingly practical and in the public interest.

Counsel for all parties have informed the undersigned that the instant case is but one of a large number of similar suits raising the same or similar questions which either have been or are about to be commenced throughout the state. This litigation involves in the aggregate large sums of money which has or will be withheld from salary payments to public employees. Thus, there exists a pressing present need for prompt determination of the constitutionality of the statute pursuant to which the wages and salaries are withheld. To facilitate a speedy resolution of the problem, counsel for the plaintiff Education Association and defendant Federation have cooperated in presenting the necessary facts to the Court by means of comprehensive requests for admissions dated June 12, 1975. Those requests propounded by counsel for the Education Association and accepted by counsel for the Federation do provide a sufficient factual basis for the undersigned to reach the ultimate constitutional issue without the necessity of further litigation.[2]

[2]Since the controlling admitted facts are summarized in the accompanying order, they are not repeated here. The issue has been presented, briefed, and argued in accordance with the order of the Chief Judge, the Honorable Douglas K. Amdahl, dated May 13, 1975.

Because the controlling factual issues are no longer disputed, the attached order does not seem to be at variance with the earlier order of the Honorable Andrew W. Danielson dated February 27, 1975 denying the plaintiff's motion for summary judgment and a permanent injunction.

In considering the issues, the undersigned has had the benefit of extensive material provided by counsel in oral argument and written memoranda.[3] That material has been helpful in understanding the parties' different positions with respect to the fair share provisions of PELRA.

The fair share law, Minn. Stats., § 179.65, subd. 2, is simple in concept and unambiguous in meaning. It provides:

1. Public employees shall have the right either to form and join labor or employee organizations and not to do so.

2. Public employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative to negotiate grievance procedures and the terms and conditions of employment for employees with the employer of such unit.

3. All public employees who are not members of the exclusive representative may be required by that exclusive representative to contribute a fair share fee for services rendered by it.

4. Upon notification by the exclusive representative of such employees, the employer shall be obligated to check off the fair share fee from the earnings of the employer and transmit the same to the exclusive representative.

[3]The writer was also given a copy of an excellent article on the subject written by Eric J. Magnuson, a student at William Mitchell College of Law, entitled NOTE: The MINNESOTA FAIR SHARE LAW: WHEN A FAIR SHARE IS NOT FAIR SHARE. Counsel for both the Education Association and the Federation were informed of that fact and have, the writer is informed, also read Mr. Magnuson's Note.

5. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the exclusive representative relating to negotiations and administration of grievance procedures.

The fair share law does not provide, among other things, for

1. The submission to anyone of an itemization of specific expenses which the exclusive representative claims to have been incurred for services rendered in relationship to negotiations and administration of grievance procedures.

2. Notice to employees who are not members of the exclusive representative of the amount of the fair share fee before it was imposed and assessed.[4]

3. An opportunity for the affected employees to be heard by the exclusive representative before determination of the fair share fee.

4. An opportunity for a full, fair, and impartial hearing before an impartial independent body with judicial or quasi judicial authority to determine whether the fair share is truly fair.

As the writer views the issues presently before the Court, the fair share concept is not in dispute. When one receives employment benefits resulting from the efforts and expenditures of others or of an organization with which he or she is not associated, the law is not offended by the idea that the person benefited ought to be required to contribute a fair share toward the expense of obtaining such employment benefits.

[4]Such notice in fact was given by the Federation to all affected persons who were not members by means of the form letter suggesting they join the Federation.

Particularly is that so when the organization is charged by law with the responsibility of all employees similarly situated occupationally whether belonging to the employee organization or not. So here the dispute revolves not around the concept of fair share. Rather does it center upon the means by which the fair share is determined. The plaintiffs contend, and the Court must agree, that what constituted a fair share for certain employees of Independent School District 281 was fixed without prior notice to affected employees who were not affiliated with the Federation and without affording them an opportunity to be heard in contravened fundamental concepts of procedural due process mandated by both the state[5] and federal constitutions.[6]

Settled Minnesota law long has required strict observance of procedural due process. *Davis v. Board of County Commissioners*, 65 Minn. 310, 67 N.W. 997

[5]Minn. Const., Art. I, sec. 7.

[6]U.S. Const., Art. XIV.

(1896)[7]; *Juster Bros. Inc. v. Christgau*, 214 Minn. 108, 7 N.W. 2d 501 (1943).[8]

Four recent United States Supreme Court decisions speak to the requirements of procedural due process applicable here. The first chronologically is *Sniadach v. Family Finance Corp.*, 305 U.S. 337 (1969). Under Wisconsin law a suing creditor could cause the clerk of court to issue a prejudgment garnishment summons, which when served on the debtor's employer would result in a portion of wages to be frozen. Short of trial on the merits, the debtor was provided no opportunity to be heard and to tender any defense he might have. That prejudgment garnishment procedure absent notice

[7]In *Davis*, the Court first stated that in proceedings which are judicial in nature and which affect a citizen's property rights, due process of law requires notice to him and an opportunity to be heard. The court then held unconstitutional a statute which authorized a county surveyor upon the request of a majority of the resident landowners in any government section in the state to locate permanent corners and subdivisional lines with ten days' notice to all resident landowners in the section of such intention and which further empowered the surveyor to apportion the cost of the work in "as equitable a manner as possible" among all the landowners in the section and then directed the county auditor to assess the cost figures as apportioned as a tax on the property of the affected landowners without any further notice or opportunity to be heard because it deprived the landowners of their property without due process of law.

[8]In *Christgau*, the Supreme Court held that procedural due process requires giving an employer notice and an opportunity to be heard in proceedings by an administrative agency to fix the employer's rate of contribution to the unemployment fund notwithstanding legislatively granted authority to the agency to dispense with notice in instances in which the employer failed to notify the agency of the termination of an employee's employment.

and a prior hearing was held to violate the fundamental principles of due process.

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), replevin statutes of Florida and Pennsylvania allowing prejudgment seizure of goods and chattels without provision for giving the possessor notice and an opportunity to challenge the seizure at any kind of prior hearing were held to cause deprivation of property without due process of law insofar as they denied the possessor of the chattels the right to be heard before the chattels were seized.

The third case is *Mitchell v. W. T. Grant Company*, 416 U.S. 600 (1974) and holds five to four that a Louisiana statute authorizing prejudgment seizure of a debtor's property sold to him on an installment sale pursuant to a writ of sequestration issued by a municipal court judge upon the creditor's petition and affidavit but without affording the debtor prior notice and an opportunity to be heard does not violate due process concepts. The opinion of the Court indicates that the majority derived comfort from the fact that the distrained chattels were not exclusively the property of the debtor and also from the statutory provision entitling the debtor to an immediate dissolution of the writ unless the creditor either proves the ground upon which the writ was issued or rebonds. *Sniadach* was distinguished on the basis that it involved a prejudgment garnishment of wages. The distinguishing feature in *Fuentes* was found to lie in the issuance of the writ by the court clerk.

Notwithstanding the fear expressed in the minority opinion in *Mitchell* that *Fuentes* had been overruled by the majority after the passage of scarcely two years,

North Georgia Finishing, Inc. v. Di-Chem, Inc., ___ U.S. ___, 95 S. Ct. 719 (1975) seems to mark a turning toward the cause charted by the majorities in *Sniadach* and *Fuentes*.

Although the present stance of constitutional doctrine concerning the minimum requirements of procedural due process as they relate to the taking or sequestration of property in prejudgment proceedings is not wholly free from ambiguity when viewed in a broad perspective, it seems clear that an employee's earnings enjoy a position of special concern. One can fairly conclude that the taking or sequestration of a person's earnings is not constitutionally tolerable absent strict observance of the requirements of prior notice and an opportunity to be heard except in certain extraordinary instances not relevant here. See *Fuentes v. Shevin*, 407 U.S. at 90-92.

Nothing in Minnesota decisional law runs to the contrary. Indeed in *Jones Press, Inc. v. Motor Travel Services, Inc.*, 286 Minn. 205, N.W. 2d 87 (1970), the Minnesota Supreme Court declared Minn. Stat., §§ 571.41, 571.42, and 571.60 unconstitutional insofar as they permitted prejudgment garnishments of money without prior notice on the authority of *Sniadach*.[9]

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[9] *In re Petition of Rentzel v. State Dept. of Highways*, 290 Minn. 88, 186 N.W. 2d 521 (1971) held that notice and an opportunity to be heard is not a constitutional prerequisite to administrative suspension of a driver's license under the Safety Responsibility Act, Minn. Stat. c. 170. That result followed in part at least from the court's view that suspension of a driver's license which is characterized as an inconvenience stands on a different footing than withholding the basic necessities of life. See the discussion at 290 Minn. 99-103.

If due process requires notice and opportunity to be heard as a prerequisite to a judicially sanctioned or ordered taking of earnings, the reasons for requiring such notice and hearing become even more compelling when the taking is accomplished without judicial sanction and supervision. It is not enough to suggest that a school board may have some kind of duty or obligation to ascertain that the sum to be taken or withheld from an employee's earnings and paid to an organization to which the employee does not belong is a fair share. Particularly does that seem true when the statute authorizing the taking imposes no such supervisory obligation upon the school board. And were a statute so to require without also providing for prior notice and opportunity for hearing to the affected employees, it would fall short of the minimum procedural due process requirements.[10]

From a consideration of the applicable constitutional principles, the undersigned concludes that due process concepts require notice to be given and an opportunity to be heard afforded to school employees before a fair share fee can be assessed by the exclusive representative and

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[10] While it is not properly the function of this Court to suggest what statutory provisions relating to fair share legislation would pass the test of due process, the following observations seem not inappropriate. At a minimum, the statute should provide before a fair share fee is fixed for adequate notice to all affected and interested parties, for a hearing before an independent, disinterested and impartial administrative agency having authority to fix a fair share fee, for a full hearing before such agency to all interested persons and parties at which both evidence and argument can be adduced, for an administrative determination of what is a fair share fee based upon full findings of fact and appropriate conclusions of law, and for appropriate review of the administrative order.

withheld from their earnings. Here no such notice and hearing were provided. Nor did the fair share provisions of PELRA require such to be given. The conclusion thus is inescapable that the members of the plaintiff Education Association and the individual plaintiffs were deprived of money which was their property without due process of law. That taking was unconstitutional as is the statutory provision pursuant to which it was done.

Let this Memorandum be attached to and made a part of the foregoing Order.

C.W.

Order for Entry of Judgment of the District Court for the County of Hennepin, Minnesota dated 22 August, 1975

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

Robbinsdale Education Association, Marilyn Threlkeld, an individual, and Daniel Hanka, an individual,

Plaintiffs,

vs.

ORDER FOR ENTRY OF JUDGMENT

Robbinsdale Federation of Teachers, Local 872; and Independent School District No. 281,

710101

Defendants.

WHEREAS, the above-entitled matter came before the above-named court at a general term thereof, held in the Government Center, City of Minneapolis, Hennepin County, Minnesota on July 9, 1975, pursuant to orders of the Honorable Douglas K. Amdahl, Chief Judge, dated May 13, 1975 and May 20, 1975, and pursuant to the plaintiffs' motion for summary judgment; Darel F. Swenson, Esq., appearing for and on behalf of the plaintiffs, and Roger A. Peterson, Esq. appearing for and on behalf of defendant Robbinsdale Federation of Teachers, Local 872, and Bernard G.

Zimpfer, Esq. appearing for and on behalf of Independent School District 281; and

WHEREAS, the matters presented to the Court for its determination were the constitutionality of the fair share provision of the Public Employment Labor Relations Act of 1971, Minnesota Statutes, § 179.65, Subd. 2, and the constitutionality of the assessment and check-off of the fair share fee in the manner described in the Court's Finding of Facts referred to hereinafter; and

WHEREAS, the matter was submitted to the Court upon the Amended Request for Admissions of Fact and of Genuineness of Documents served by counsel for the plaintiffs on defendant Robbinsdale Federation of Teachers, Local 872, Robbinsdale Federation of Teacher's Acceptance of Statements of Admissions filed by its counsel, written briefs, and oral argument; and

WHEREAS, the Court entered Findings of Fact, Conclusions of Law and its Order, a copy of each of which is attached hereto, incorporated herein, and made a part hereof; and

WHEREAS, the Court has expressly determined that, while the Order entered and referred to hereinabove relates to only two of the multiple claims for relief asserted by the plaintiffs in the above-captioned action, there is no just reason for delaying entry of judgment respecting the two claims,

NOW, THEREFORE, this Court, pursuant to Rule 58.01 and Rule 54.02 of the Minn. R. Civ. P. for the District Courts, expressly directs that the judgment be entered for the plaintiffs declaring and determining that:

1. The assessment and check-off by the defendants of a fair share fee in the manner described in the

above-referred to Findings of Fact violated the plaintiffs' right to due process of law and were, therefore, unconstitutional under the Constitution of the State of Minnesota, Article I, Section 7.

2. The assessment and check-off by the defendants of a fair share fee in the manner described in the above referred to Findings of Fact violated the plantiffs' right to due process of law and were, therefore, unconstitutional under the Constitution of the United States, Article XIV.

3. The portion of Minnesota Statutes, Section 179.65, Subd. 2 quoted in No. 3 of the above referred to Conclusion of Law violates the plaintiffs' right to due process of law and is, therefore, unconstitutional under the Constitution of the State of Minnesota, Article I, Section 7.

4. The portion of Minnesota Statutes, Section 179.65, Subd. 2 quoted in No. 3 of the above referred to Conclusions of Laws violates the plaintiffs' right to due process of law and is, therefore, unconstitutional under the Constitution of the United States, Article XIV.

Dated: August 22, 1975.

BY THE COURT:

/s/ Donald T. Barbeau

Judge of District Court
Donald T. Barbeau
Chief Judge, Dist. Ct.

**Judgment of the District Court
for the
County of Hennepin, Minnesota
dated 25 August, 1975**

sdk
STATE OF MINNESOTA 710 101 DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICAL DISTRICT

Robbinsdale Education Association,
Marilyn Threlkeld, an individual,
and Daniel Hanka, an individual,

Plaintiffs, JUDGMENT

vs.

Robbinsdale Federation of Teachers, August 25, 1975
Local 872; and Independent School
District No. 281,

Defendants.

This cause having been regularly placed upon the calendar of the above named Court for the September A.D. 1974 General Term thereof, came on for hearing before the Court on the 9th day of July A.D. 1975, upon motion of plaintiffs' motion for summary judgment, and the Court, after hearing the arguments of counsel and being advised in the premises, did on the 22nd day of August A.D. 1975, duly make and file its order granting said motion and for judgment herein.

Now, pursuant to said order and on motion of Darel F. Swenson, Esq., attorney for the plaintiffs, IT IS HEREBY ADJUDGED:

1. That the assessment and check-off by the defendants of a fair share fee in the manner described in the Findings of Fact violated the plaintiffs' right to due process of law and were, therefore, unconstitutional under the Constitution of the State of Minnesota, Article I, Section 7.

2. That the assessment and check-off by the defendants of a fair share fee in the manner described in the Findings of Fact violated the plaintiffs' right to due process of law and were, therefore, unconstitutional under the Constitution of the United States, Article XIV.

3. That the portion of Minnesota Statutes, Section 179.65, Subd. 2 quoted in No. 3 of the Conclusion of Law violates the plaintiffs' right to due process of law and is, therefore, unconstitutional under the Constitution of the State of Minnesota, Article I, Section 7.

4. That the portion of Minnesota Statutes, Section 179.65, Subd. 2 quoted in No. 3 of the Conclusions of Law violates the plaintiffs' right to due process of law and is therefore, unconstitutional under the Constitution of the United States, Article XIV.

BY THE COURT

DISTRICT COURT ADMINISTRATOR
By /s/ D. Elliott Deputy

JUDGMENT ROLL

Filed August 25, 1975
DIST. COURT ADMIN.

By /s/ D. Elliott *Deputy*

APPENDIX B

Opinion of the Supreme Court
of Minnesota
dated 23 January, 1976

No. 281-1/2 Hennepin County MacLaughlin, J.

Robbinsdale Education
Association, et al,

Respondents,

46216 vs.

Robbinsdale Federation of
Teachers Local 872,

Appellant,

Independent School
District 281,

Respondent.

Filed
Endorsed January 23, 1976
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Minn. St. 179.65, subd. 2, the so-called fair share statute, does not violate constitutional standards of procedural due process since we interpret the Public Employees Labor Relations Act, of which § 179.65, subd. 2, is a part, to implicitly provide that a public employee has (a) the right to notice of the amount of an impending fair share fee which is to be deducted from his earnings; (b) the right to bring an action in district court to enjoin the use of the withhold fee; (c)

the right, under certain exigent circumstances, to have the collection of the fair share fee enjoined, and (d) the right, in all circumstances and upon proper application, to a court hearing on the validity and proper amount of the fair share fee.

The fact that in the absence of unusual circumstances the hearing and final judicial determination of the fee's validity and amount will probably not occur prior to the actual withholding of the fair share fee from the employee's paycheck does not by itself render the statute unconstitutional.

Reversed.

Heard and considered by the court en banc.

OPINION

MacLAUGHLIN, Justice.

The sole issue on this appeal is whether Minn. St. 179.65, subd. 2, the "fair share" statute, deprives an individual of property without providing procedural due process. The trial court concluded that the statute violated the due process clauses of the Minnesota and United States Constitutions in that "it makes no provision for notice and hearing prior to the determination of the fair share fee for services." We reverse.

The "fair share" statute is a part of the Public Employees Labor Relations Act (PELRA), Minn. St. 179.61 to 179.77. The purpose behind PELRA is to "promote orderly and constructive relationships between all public employers and their employees, subject however, to the paramount right of the citizens of this state to keep inviolate the guarantees for their health, education, safety and welfare." § 179.61. The

legislature recognized that "unique approaches to negotiations and resolutions of disputes between public employees and employers are necessary" to fulfill this purpose. Id. As a result, PELRA provides that any bargaining unit of employees may elect by majority vote an employee organization representative who shall then be certified as the "exclusive representative of all employees in the unit." § 179.67, subd. 12. The act contemplates that all employees in a given bargaining unit are entitled to share equally in the benefits obtained by the exclusive representative through negotiations or grievance proceedings. Consequently, the act provides in § 179.65, subd. 2:

> "* * * [A]ll public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures."

Appellant, Robbinsdale Federation of Teachers Local 872, is an employee organization whose members are some, but not all, of the employees of Independent School District No. 281. Appellant has been elected the exclusive representative of all employees in the school district belonging to certain bargaining units, whether

the employees are members of appellant or not.[1] Respondents Marilyn Threlkeld, a nonprofessional employee of the school district, and Daniel Hanka, a professional employee of the school district, are not members of appellant but are, of course, represented by appellant in bargaining and grievance procedures. Respondent Robbinsdale Education Association is an employee organization which has as its members some of the professional employees of the school district.

In May 1974, appellant voted to require a fair share contribution from all the employees of the school district represented by appellant but who are not members of appellant, such as respondents Threlkeld and Hanka, and many of the members of the Robbinsdale Education Association. Appellant notified the school district of the amount of the fair share fee; and the school district, pursuant to § 179.65, subd. 2, began withholding or checking off from the paychecks of respondents Threlkeld and Hanka, among others, the designated amount of the fair share fee. Appellant informed respondents Robbinsdale Education Association and Hanka prior to the time of the first checkoffs, but did not so inform respondent Threlkeld. At no time were any of the respondents given an opportunity for a hearing by an independent and impartial body regarding their objections to the checkoff from their earnings of fair share contributions or the amount of such checkoffs.

On November 6, 1974, respondents brought this action challenging the validity of § 179.65, subd. 2. An

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[1] Minn. St. 179.65, subd. 2, provides that "[p]ublic employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative * * *."

agreement was reached by the parties on December 18, 1974, which provided that all fair share funds withheld from the employees' paychecks would be placed in an escrow account pending final determination of this action. On the basis of an agreed statement of facts, the trial court held that § 179.65, subd. 2, violated the due process clauses of the Minnesota and United States Constitutions because there is no provision for notice and hearing prior to the determination of the fair share fee.

The issue before the trial court, and before this court, is whether the fair share statute passes constitutional muster when neither it nor any of the other provisions of PELRA specifically provides for a hearing prior to the imposition of the fair share fee upon nonmembers of appellant. This act, like every legislative enactment, comes to us with a presumption in favor of its constitutionality. Klicker v. State, 293 Minn. 149, 197 N. W. 2d 434 (1972); Head v. Special School Dist. No. 1, 288 Minn. 496, 182 N. W. 2d 887 (1970), certiorari denied sub. nom. Minneapolis Federation of Teachers, Local No. 59, v. Spannaus, 404 U.S. 886, 92 S. Ct. 196, 30 L. ed. 2d 168 (1971). The burden of proof is on the challenging parties to show beyond a reasonable doubt that the act is unconstitutional. Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 147 N. W. 2d 358 (1966). Further, it is well established that when the constitutionality of a statute is challenged, the language of the entire act must be taken into consideration, and "[i]f the act is reasonably susceptible of two different constructions, one of which will render it constitutional and the other unconstitutional, the former construction must be adopted." State v. Suess, 236 Minn. 174, 181,

52 N. W. 2d 409, 414 (1952); In re Texas on Property of Cold Spring Granite Co. 271 Minn. 460, 136 N. W. 2d 782 (1965).

Since PELRA is challenged on the ground that it denies procedural due process,[2] it is particularly important that we consider those provisions in the act which provide procedural remedies. Section 179.76 of the act states in part:

> "It shall be the public policy of the state of Minnesota that every public employee should be provided with the right of independent review, by a disinterested person or agency, of any grievance arising out of the interpretation of or adherence to terms and conditions of employment."

More importantly, § 179.68, subd. 1, of the act provides:

> "Any employee * * * aggrieved by an unfair labor practice * * * may bring an action in district court of the county wherein the practice is alleged to have occurred for injunctive relief and for damages caused by such unfair labor practice."

Section 179.68, subds. 2 and 3, detail certain acts, or failures to act, which constitute unfair labor practices. Specifically, § 179.68, subd. 3(1), prohibits employee organizations from "restraining or coercing employees in the exercise of their rights as provided in sections 179.61 to 179.77." Considering these provisions together, we have concluded that the imposition upon a

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[2] All parties agree that persons in the position of respondents are entitled to a hearing on the validity and the amount of the fee at some stage of the proceeding, but respondents argue it must be prior to the withholding of the fee while appellant argues that it may be after the withholding.

nonmember employee of a fair share fee which is not consistent with the provisions of the statute constitutes an unfair labor practice. Therefore, pursuant to § 179.68, subd. 1, a public employee aggrieved by such a practice may bring an action in district court for injunctive relief. Further, as we construe the statute, the district court, at the request of either party, may determine the validity and proper amount of the fair share fee.

In such an action, the district court shall, at the request of the complaining party, enjoin the *use* of the disputed fees until the exclusive representative establishes to the satisfaction of the district court the validity and correctness of the fee under the statutory formula; and the district court shall provide an appropriate escrow arrangement for the disputed fees until final determination of these questions. Further, the district court may, in the exercise of its sound and cautiously exercised discretion, enjoin the *collection* of such fees if it is persuaded by the complaining party that the amount of the fee or the circumstances surrounding its assessment clearly indicate that the fee is invalid because it is so excessive that it is punitive or oppressive when measured against the statutory formula, or for other reasons which clearly contravene the statute.

In sum, we have concluded that PELRA should be construed to provide that the public employee has (a) the right to notice of the amount of an impending fair share fee which is to be deducted from his earnings; (b) the right to bring an action in district court to enjoin the use of the withheld fee; (c) the right, under certain exigent circumstances, to have the collection of the fair share fee enjoined; and (d) the right, in all circum-

stances and upon proper application, to a court hearing on the validity and proper amount of the fair share fee. We have concluded, however, that, in the absence of unusual circumstances, the hearing and final judicial determination of the fee's validity may follow the actual withholding of the fair share fee from the employee's paycheck.

Due process is a flexible standard which does not guarantee any "particular form of procedure," but rather "protects substantial rights." N.L.R.B. v. Mackay Radio & Tel. Co. 304 U.S. 333, 351, 58 S. Ct. 904, 913, 82 L. ed. 1381, 1393 (1938). Most importantly, "[t]he determination of what due process requires in a given context depends on a consideration of both the nature of the governmental function involved and the private interests affected." Mitchell v. W. T. Grant Co. 416 U.S. 600, 624, 94 S. Ct. 1895, 1908, 40 L. ed. 2d 406, 423 (1974) (Powell, J., concurring). See, also, Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. ed. 2d 287 (1970); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 81 S. Ct. 1743, 6 L. ed. 2d 1230 (1961).

An examination of the conflicting state and individual interests in the instant case convinces us that the procedural remedies encompassed by the statute, as interpreted in this opinion, comply with due process standards. In reaching this conclusion, we have first evaluated "the nature of the * * * private interests affected" in the instant case and have compared those interests to the individual interests involved in other cases in which the United States Supreme Court has required a hearing prior to the actual taking. In that connection respondents strongly argue that an individual's wages are a "specialized type of property"

and that, under Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S. Ct. 1820, 23 L. ed. 2d 349 (1969), an individual must be accorded a prior hearing before deductions may be made from his wages. In Sniadach, the court struck down a Wisconsin statute authorizing a creditor to garnish a debtor's wages without first providing a hearing. The court reasoned that even though the debtor might ultimately recover the garnished wages in the main action the debtor was nevertheless deprived of the use of those funds during the interim.

> "* * * Since this deprivation cannot be characterized as *de minimis*, [the debtor] must be accorded the usual requisites of procedural due process: notice and a prior hearing." 395 U.S. 342, 89 S. Ct. 1823, 23 L. ed. 2d 354 (Harlan, J., concurring).

We believe that the requirements of procedural due process depend not upon the particular "type of property" involved, but upon the effect of its deprivation on the individual. In Goldberg, the Supreme Court stated (397 U.S. 262, 90 S. Ct. 1017, 25 L. ed. 2d 296):

> "* * * The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievious loss,' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."

This aspect of "grievous loss" also dominated the court's opinion in Sniadach (395 U.S. 340, 89 S. Ct. 1822, 23 L. ed. 2d 353):

> "A prejudgment garnishment of the Wisconsin type [up to 50 percent of the wages are frozen] is a taking which may impose *tremendous hardship* on wage earners with families to support. * * *
>
> * * * * *
>
> "The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." (Italics supplied.)

And in North Georgia Finishing, Inc. v. Di-Chem, Inc. 419 U.S. 601, 95 S. Ct. 719, 42 L. ed. 2d 751 (1975), the Supreme Court's most recent pronouncement on procedural due process, the extent of injury to the individual remains a dominant concern (419 U.S. 608, 95 S. Ct. 723, 42 L. ed. 2d 758):

> "* * * It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of *irreparable injury* in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error." (Italics supplied.)

The deprivation threatened by the fair share statute is of a much lesser magnitude than the "grievous loss" in Goldberg, the "tremendous hardship" in Sniadach, or the "irreparable injury" in North Georgia Finishing. In the instant case, the individual interest at stake is less than $10 per month. While this amount will no doubt vary depending on the circumstances, political realities prevent an exclusive representative from attempting to impose an excessively large fee. And if such an attempt is made, the individual employee will be protected by his right, as outlined herein, to enjoin, pending a hearing, the collection of the fee in cases which involve egregious circumstances. Thus, since there are sufficient

safeguards in the fair share statute to protect the individual employee from any significant loss of property, safeguards which were lacking in all of the creditor remedy statutes invalidated by the Supreme Court, the employee's need for a prior hearing is substantially reduced.

The second step in determining the requirements of due process is to examine the "nature of the governmental function involved." Mitchell v. W. T. Grant Co. *supra.* The state's reason for allowing appellant to assess a fair share fee is that a union selected as a bargaining agent by the majority of workers in the appropriate unit must represent all employees in the unit in a nondiscriminatory manner. Unless the nonmember employees in the unit are compelled to contribute to the costs of union representation, they would enjoy the benefits of the bargaining process while the members of the exclusive representative are forced to assume the entire burden of paying for it. In addition, since the members of the exclusive representative may be unable to adequately finance the negotiation and administration of a collective bargaining agreement without such non-member contributions, the resulting financial instability of the duly elected representative may jeopardize meaningful collective bargaining.[3] See, Buckley v. American Fed. of Television & Radio Artists, 496 F. 2d

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[3]This financial instability might "encourag[e] the union to assume an unnecessarily militant attitude toward management in an effort to rally more employees to its financial support. This instability also encourages the employer to be obstinate, in hopes of forcing a favorable agreement from a weak union." Blair, *Union Security Agreements in Public Employment,* 60 Cornell L. Rev. 183, 189.

305 (2 Cir. 1974), certiorari denied, 419 U.S. 1093, 95 S. Ct. 688, 42 L. ed. 2d 687 (1974).

We have concluded, and we believe our conclusion is supported by the applicable decisions of the United States Supreme Court, that the governmental interest in securing the financial stability of these exclusive representatives is sufficiently strong to override the individual's interest in obtaining a prior determination of the imposed fee's validity. In International Assn. of Machinists v. Street, 367 U.S. 740, 81 S. Ct. 1784, 6 L. ed. 2d 1141 (1961), and in Brotherhood of Railway & Steamship Clerks v. Allen, 373 U.S. 113, 83 S. Ct. 1158, 10 L. ed. 2d 235 (1963), the United States Supreme Court considered the importance of the governmental interest in allowing unions to collect statutorily imposed fees. In Street, the plaintiffs complained that a provision of the Railway Labor Act which required employees to become members of the exclusive bargaining union and to pay fees required by the union violated the First and Fifth Amendments in that it permitted the union to force them to financially support political causes which they opposed. The court construed the statute as prohibiting a union from using the forced fees, over employees' objections, to support political causes. In deciding the case, the court vacated a state court injunction against the collection of union fees, stating (367 U.S. 771, 81 S. Ct. 1801, 6 L. ed. 2d 1162):

> "* * * [R]estraining collection of the funds * * * might well interfere with the appellant union's performance of those functions and duties which the [statute] places upon them to attain its goal of stability in the industry. * * * The complete shutoff of this source of income defeats the

> congressional plan to have all employees benefited share costs 'in the realm of collective bargaining,' * * *."

The court reached the same result in Allen (373 U.S. 120, 83 S. Ct. 1163, 10 L. ed. 2d 241):

> "* * * * We think that lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, dissenting employees (at least in the absence of special circumstances not shown here) can be entitled to no relief until final judgment in their favor is entered."

See, also, Railway Employes' Dept., AFL v. Hanson, 351 U.S. 225, 76 S. Ct. 714, 100 L. ed. 1112 (1956).

Thus, although not directly addressing the question of procedural due process, the United States Supreme Court has concluded that absent special circumstances the governmental interest in the regular collection of union fees should not be impaired by a court injunction. So, too, we have concluded that absent special circumstances the district court should not enjoin the collection of the fair share fees. The "special circumstances" that would justify an injunction against collection would exist if either the amount of the fee, or the circumstances surrounding its assessment, clearly indicate that the fee is invalid or unconscionable under the statutory provisions. In such a case, the state has no interest in permitting the exclusive representative to collect a patently invalid fair share fee.

On the other hand, the governmental interest in union stability is not so compelling as to bar an injunction against the use of the union fees until their validity has been determined in a hearing before the district court. The Supreme Court in Street, and again

in Allen, approved a remedy which would enjoin the use of the disputed portion of the fees until the validity of such use could be determined.[4] The responsibility for initiating such a court determination properly rests with the individual employee. As stated in Street (367 U.S. 774, 81 S. Ct. 1803, 6 L. ed. 2d 1164), "dissent is not to be presumed–it must affirmatively be made known to the union by the dissenting employee." Although the individual employees are responsible for initiating the action, it is the union which must bear the ultimate burden of proving the fee's validity. As the court stated in Allen (373 U.S. 122, 83 S. Ct. 1163, 10 L. ed. 2d 241):

> "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion."

Thus, the Supreme Court contemplated a procedure whereby upon a complaint by an employee a union would be unable to use the disputed portion of fees imposed by statute until the union proved that its use of such fees complied with the governing statute. In the instant case, through the procedures we have outlined, a union would be unable to use the disputed fair share

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[4]The specific remedy suggested by the Court was an injunction against the use of that portion of the fee which "is the proportion of the union's total expenditures made for such political activities to the union's total budget." International Assn. of Machinists v. Street, 367 U.S. 740, 775, 81 S. Ct. 1784, 1803, 6 L. ed. 2d 1141, 1174. Under the facts of the instant case, there would be no need to employ such a formula.

fees until the union proved that the amount of such fees complied with the governing statute.

The probability that under this procedure a particular fair share fee's validity and amount will not be finally determined until after deductions have been made from the employee's paycheck does not render the statute unconstitutional. A prior hearing is not the sine qua non of procedural due process since "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Mitchell v. W. T. Grant Co. 416 U.S. 600, 610, 94 S. Ct. 1901, 40 L. ed. 2d 406, 415, quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L. ed. 2d 1230, 1236 (1961). Again, it must be stressed that the procedural protections to which an individual is constitutionally entitled depend on the balancing of interests in each particular case. While the Supreme Court required a prior hearing in Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S. Ct. 1820, 23 L. ed. 2d 349 (1969); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. ed. 2d 556 (1972); and North Georgia Finishing, Inc. v. Di-Chen, Inc. 419 U.S. 601, 95 S. Ct. 719, 42 L. ed. 2d 751 (1975), the balance of interests in those cases was significantly different from that in the instant case. As shown herein, the individual property interest in this case is of a much lesser magnitude than was involved in those cases, and the state's interest in the collection of the fair share fee is clearly more substantial than it was in Sniadach, Fuentes, and North Georgia Finishing, which involved creditor-debtor relationships of private citizens. Consequently, since in the instant case the individual's interest is less significant and the state's interest is more

substantial, the demands of procedural due process are correspondingly reduced.

In summary, we hold only that, with respect to procedural requirements, the fair share statute, Minn. St. 179.65, subd. 2, does not violate the due process clauses of the United States or Minnesota Constitutions.[5]

Finally, we invite the attention of the legislature to the questions raised by this appeal. Although there may be factors of which we are not aware, it would not appear that undue delay would be caused if, for example, before the fair share fee was imposed and withheld, the exclusive representative was required to document and submit its calculation of the fee to the director of mediation services or the Public Employees Labor Relations Board.[6] The director or the board could afford interested employees, prior to the actual payroll deduction of the fee, an opportunity to inspect and, if warranted, challenge the validity and amount of the fee. The director or board could then allow, disallow, or modify the proposed fee with a short

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[5]We have not considered the question of the constitutionality of the fair share fee on grounds other than procedural due process.

[6]The powers and duties of these bodies are contained in Minn. St. 179.71 and 179.72.

In Hawaii, the Hawaii Public Employment Relations Board is the neutral tribunal which determines the bargaining service fee which nonunion employees must pay a majority union under a fair share agreement. See, 525 Govt. Employee Rel. Rep., October 15, 1973, at E-1.

written statement explaining the action.[7] Such a decisional process might render the imposition of the fee more acceptable to the nonmember employees while also developing a body of precedent to define the proper elements of expense to be included in the fair share fee. Any such procedures, however, are not for this court to impose, but must be left to the sound discretion of the legislature.

Reversed.

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[7]Of course, there would be a right to appeal to the district court from a determination of the director or board. Whether the fee could be deducted and held in escrow during the period of the appeal would be a question for legislative determination.

Judgment of the Supreme Court of Minnesota dated 11 February, 1976

STATE OF MINNESOTA, SUPREME COURT

Robbinsdale Education Association, Marilyn Threlkeld and Daniel Hanka,

Respondents,

vs. 46216

Robbinsdale Federation of Teachers Local 872,

Appellant,

Independent School District No. 281,

Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things reversed.

Dated and Signed February 11, 1976

BY THE COURT.

Attest:
John McCarthy Clerk

State of Minnesota)
SUPREME COURT) ss.

I, John McCarthy, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry Judgment in the case therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the

Capitol, in the City of St. Paul March 17, 1976

/s/ John McCarthy, Clerk.

APPENDIX C

Notice of Appeal
filed 12 February, 1976

No. 46216

IN THE SUPREME COURT OF
THE STATE OF MINNESOTA

Marilyn Threlkeld and Daniel Hanka,

Appellants,

vs.

The Robbinsdale Federation of
Teachers, Local 872,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Marilyn Threlkeld and Daniel Hanka, the Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Minnesota, entered in this action on February 11, 1976, reversing the judgment of the District Court of Hennepin County, State of Minnesota, declaring the fair

share fee provision of Minnesota Statutes § 179.65, Subd. 2 to be unconstitutional because it is violative of procedural due process.

This appeal is taken pursuant to 28 U.S.C. § 1257, Subd. 2.

LARSON, MANNIKKO & SWENSON

By /s/ Robert P. Larson
Robert P. Larson
210 First National Bank Bldg.
Wayzata, Minnesota 55391
(612) 473-0229

and

/s/ Dr. Edwin Vieira, Jr.
Dr. Edwin Vieira, Jr.
12408 Greenhill Drive
Silver Spring, Maryland 20904
(301) 622-1448

Counsel for Appellants

Supreme Court, U. S.
JUN 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1628

MARILYN THRELKELD, *et al., Appellants,*

v.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872,
Appellee.

On Appeal from the Supreme Court of Minnesota

APPELLEE'S MOTION TO VACATE AND REMAND

ROGER PETERSON
700 Title Insurance Building
Minneapolis, Minnesota 55401
Attorney for Appellees

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1628

MARILYN THRELKELD, *et al., Appellants,*

v.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872,
Appellee.

On Appeal from the Supreme Court of Minnesota

APPELLEE'S MOTION TO VACATE AND REMAND

The brief *amicus curiae* filed by the State of Minnesota sets out both: the intervening change in law which occurred between the entry of the Supreme Court of Minnesota's judgment appealed from and the filing of the Jurisdictional Statement; and this Court's precedents which dictate that in this situation the proper course is to vacate the judgment below and remand to the Minnesota courts with leave to the appellants to amend their pleadings, and with leave to the Minnesota courts to dismiss if the case is or becomes moot.

The appellee agrees with the position stated in the State's brief *amicus curiae* and therefore moves that the Supreme Court of Minnesota's judgment in this case be vacated and the matter remanded to the Minnesota courts with leave to the appellants to amend their pleadings and with leave to the Minnesota courts to dismiss if the case is or becomes moot.

Respectfully submitted,

ROGER PETERSON
700 Title Insurance Building
Minneapolis, Minnesota 55401
Attorney for Appellees

CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
JUL 14 1976
MICHAEL RODAK, JR., CLERK

No. 75-1628

MARILYN THRELKELD, *et al.*,

Appellants,

v.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO VACATE AND REMAND

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1628

MARILYN THRELKELD, *et al.*,

Appellants,

v.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872,

Appellee,

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO VACATE AND REMAND

Appellants Marilyn Threlkeld and Daniel Hanka (hereinafter the "Teachers") file this brief in opposition to the motion of appellee Local 872, Robbinsdale Federation of Teachers, and the brief *amicus curiae* of the State of Minnesota, which urge this Court not to hear the Teachers' appeal.

ARGUMENT

Appellee Local 872 has moved this Court to vacate the judgment of the Minnesota Supreme Court and remand with instructions that the appellant Teachers be permitted to amend their complaint to reflect the recent amendment of Minn. Stat. §179.65, subd. 2, the statutory provision in issue here. Local 872 contends that the statutory amendment renders moot any need for declaratory relief in this case. Motion at 2, *citing Diffenderfer* v. *Central Baptist Church,* 404 U.S. 412 (1972); *see* Brief *Amicus Curiae* Raising a Question of Mootness for the State of Minnesota at 10. This contention is without merit, for two reasons: I. The disposition of monies caused to be seized from the Teachers by Local 872 under color of Minn. Stat. § 179.65, subd. 2, prior to its amendment, and now held in an escrow account, turns upon the constitutionality of that seizure under the statute which purported to authorize it, and not upon the constitutionality of seizures which might be made in the future under color of the statute as subsequently amended. II. The amendment of Minn. Stat. § 179.65, subd. 2, has in no way altered the issues of notice and prior hearing under the Fourteenth Amendment which the Teachers raised in their Jurisdictional Statement, since the amendment merely embodies in explicit terms the unconstitutional notice–and hearing-procedures read into the statute by the Minnesota Supreme Court in the decision here on appeal.

I.

The Teachers' appeal presents a live controversy over the possession of "fair-share" fees now held in escrow, which this Court can and should resolve.

The Teachers' amended complaint sought, *inter alia,* a declaratory judgment that the original "fair-share" wage-garnishment scheme is repugnant, on its face and as applied, to the Due Process Clause of the Fourteenth Amendment. Juris. Statement at 8. Shortly after filing the complaint the Teachers entered into an escrow agreement with Local 872. App. A, attached hereto. By the terms of this agreement, all "fair-share" fees were to be, and in fact have been, withheld from the Teachers' earnings by their employer and deposited in a specified account–where they shall remain until "a final judicial determination has been made regarding the issues in the declaratory judgment action, and a court order entered relating to that determination* * *." App. A at 4a. The existence of this agreement, now in full force, precludes a finding of mootness here.

The facts of *Powell* v. *McCormack,* 395 U.S. 486 (1969), are strikingly similar to those presented in this appeal. Powell sought a declaratory judgment that his exclusion from the House of Representatives, 90th Congress, was unconstitutional; and he requested injunctive relief to compel payment of his salary. While the case was pending before this Court, the 90th Congress terminated; the 91st Congress came into session; and Powell took his seat therein. Respondents then filed a suggestion of mootness, contending that the central question of Powell's complaint, the constitutionality of his exclusion from the 90th Congress, was

no longer properly in issue, since the 90th Congress had ceased to exist and Powell had been seated in the 91st. In response, Powell argued that there remained the unresolved issue of whether he was entitled to the salary withheld from him during the term of the 90th Congress. This Court agreed "that Powell's claim for back salary remains viable even though he has been seated in the 91st Congress * * *." 395 U.S. at 496 (footnote omitted); *accord, Bond* v. *Floyd,* 385 U.S. 116, 128 n.4 (1966).

The reasoning of *Powell* is fully applicable here. *Compare* 395 U.S. at 496-500, *with* Juris. Statement at 6-18. Who is entitled to possession and use of the escrowed "fair-share" fees is not an issue "wholly incidental and subordinate" to the Teachers' claim, but instead the *primary* question presented in this appeal. The party against whom the Teachers seek relief, Local 872, is identified with sufficient clarity for this Court to enter an appropriate judgment – and, indeed, is a signatory to an escrow agreement which itself testifies that the Teachers' "claim is still unresolved and hotly contested by clearly adverse parties." 395 U.S. at 498.

The amendment of Minn. Stat. § 179.65, subd. 2, has no bearing on this claim. The "fair-share" fees *now escrowed* were seized, as no one denies, without notice and *prior* hearing *under color of the unamended statute.* And the Teachers' claim is that such a seizure, depriving them of the present use and enjoyment of their wages, is repugnant to the Due Process Clause of the Fourteenth Amendment – whether or not some future seizure of *other* fees, under color of the amended statute, might also be unconstitutional. If Local 872 is entitled to the monies *now held in escrow,* it can only be because the statute *which authorized*

their seizure in 1974 and 1975 is not unconstitutional. Local 872 cannot rely upon an amendment passed *in 1976* to justify what it did many months' earlier – especially when that amendment fails to guarantee the *notice* and *pre-seizure hearing* which the Teachers claim the Due Process Clause requires under the circumstances of this case.

Therefore, the rule of *Diffenderfer* v. *Central Baptist Church,* 404 U.S. 412 (1972), upon which local 872 and *amicus* State of Minnesota rely, is neither governing nor even relevant here. In *Diffenderfer,* the only relief sought was: (i) a declaratory judgment that a Florida statute which, before its repeal, had allowed tax exemptions for church property was unconstitutional as applied to a church parking lot allegedly used for commercial purposes; and (ii) an injunction against application of the then-nonexistent provision to the lot. Quite correctly, this Court noted that the "relief is, of course, inappropriate now that the statute has been repealed." 404 U.S. at 415. For, in effect, Diffenderfer had already obtained from the Florida Legislature the relief he sought: *viz.,* the removal of the lot's tax-exempt status. Here, conversely, the Teachers have yet to obtain the relief they seek: *viz.,* return of the "fair-share" fees unconstitutionally seized for the benefit of Local 872. Quite the contrary. The Minnesota Legislature has now explicitly enacted into Minn. Stat. § 179.65, subd. 2, the very procedure for "fair-share" seizures which the Teachers have argued all along is repugnant to the Due Process Clause of the Fourteenth Amendment.

II.

The amendment to the "fair-share" provision has exacerbated, not mitigated or mooted, the constitutional infirmities of the wage-garnishment scheme.

The recent amendment of Minn. Stat. § 179.65, subd. 2, far from rendering moot the constitutional issue now before this Court, explicitly endorses the erroneous theory of procedural due process upon which the Minnesota Supreme Court relied in the decision from which the Teachers appeal. *Compare* Juris. Statement at 14-15, *with* Brief Amicus Curiae Raising a Question of Mootness for the State of Minnesota at 5-8. The "fair-share" provision, *as amended,* is thus (for constitutional purposes) the equivalent of the "fair-share" provision, *as construed by the Minnesota Court.*

It is true that, under the new law, no monies may be garnished from the wages of employees who are not members of the exclusive representative unless

> the exclusive representative shall provide advance written notice of the amount of the fair share fee assessment to the director [of the Bureau of Mediation Services], the employer and to a list furnished by the employer of all employees within the unit.

Minn. Stat. § 179.65, subd. 2, as amended. It is true, but irrelevant to the constitutional issue raised here. For the Teachers claim that "*constitutional* 'notice' is *not* the mere information that one is to be deprived of * * * property in fact, but rather notice *of a hearing of some kind* at which the validity of the deprivation will be put in issue." Juris. Statement at 12. The new statute does not provide for such notice.

It is also true that, under the new law, a nonunion employee may himself file a challenge to the "fair-share" assessment, and that, *if such a challenge is filed,* the fees will not be transmitted to the exclusive representative but will instead be held in escrow pending a hearing by administrative officials:

> A challenge by an employee or by a person aggrieved by the assessment shall be filed in writing with the director, the public employer, and the exclusive representative within 30 days after receipt of the written notice. All challenges shall specify those portions of the assessment challenged and the reasons therefor but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. The employer shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative 30 days after the written notice was provided, or, in the event a challenge is filed, the deductions for a fair share fee shall be held in escrow by the employer pending a decision by the director * * *.

Minn. Stat. § 179.65, subd. 2, as amended. True, but (again) irrelevant to the constitutional issue. For the Teachers claim that a *constitutional* hearing must be *initiated by Local 872,* and must *precede* the seizure of their wages. Juris. Statement at 14-18.

Furthermore, the amendment of the "fair-share" provision has exacerbated the constitutional problems inherent in the old garnishment scheme *by removing the statutory standard which the old law contained.* Under the original "fair-share" law, an exclusive representative could ask only for a fee which did not

> exceed a pro rata share of the specific expenses incurred for services rendered by the representative

> in relationship to negotiations and administrative of grievance procedures.

Minn. Stat. § 179.65, subd. 2 (1974). Now, the "fair-shair" fee may be

> in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues.

Minn. Stat. § 179.65, subd. 2, as amended. The Minnesota Legislature has thus seen fit to dispense with even the pretense that the fees serve to defray expenses of the exclusive representative in relation to "collective bargaining", and only in relation to "collective bargaining". This makes even more pressing the due-process issue of "benefit" which the Minnesota Supreme Court begged when it upheld the old law. *See* Juris. Statement, App. B at 11b, *and compare with, e.g., Browning* v. *Hooper,* 269 U.S. 396 (1926).

The "fair-share" amendment, then, has in no way mooted the basic procedural-due-process issues of notice, hearing, and benefit raised in the Minnesota courts and now properly here on appeal. *See, e.g., Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 413-14 (1935) (and cases there cited).

CONCLUSION

This court should note probable jurisdiction of the Teachers' appeal.

Respectfully submitted,

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APPENDIX A

Escrow Agreement Between the Teachers and Local 872 dated 18 December, 1974

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

The Robbinsdale Education Association, Marilyn Threlkeld, an individual, and Daniel Hanka, an individual,

Plaintiffs,

v. *ESCROW AGREEMENT*

The Robbinsdale Federation of Teachers, Local 872, and Independent School District 281,

Defendants.

THIS ESCROW AGREEMENT, made and entered into on this 18th day of December, 1974, by and between The Robbinsdale Education Association (hereinafter "Association"), Marilyn Threlkeld, (hereinafter "Threlkeld") and Daniel Hanka, (hereinafter "Hanka") plaintiffs in the above-entitled action, The Robbinsdale Federation of Teachers, Local 872 (hereinafter "Federation"), and Independent School District 281 (hereinafter "District"), defendants in the above-entitled action;

WITNESSETH:

WHEREAS, the Association, Threlkeld and Hanka are parties plaintiff, and the Federation and the District, parties defendant, in a declaratory judgment action brought in Hennepin County District Court for the purposes of determining the construction and validity of Minnesota Statutes §179.65(2), and for other relief, and

WHEREAS, the Federation is the certified exclusive representative of certain employees of defendant District, and,

WHEREAS, defendant District is the public employer of Threlkeld and Hanka, and of the members of the Association and of the members of the Federation, and,

WHEREAS, the plaintiffs are public employees of defendant District but are not members of the defendant Federation, and

WHEREAS, M.S.A. §179.65(2) authorized the Federation to require all public employees who are not members of the exclusive representative to contribute a fair share fee for services rendered by the exclusive representative in relationship to negotiations and administration of grievance procedures and further authorizes the exclusive representative to notify the employer of said public employees of its requirement and further authorizes said employer to check off from the earnings of said public employees the fair share contribution required by the exclusive bargaining agent and further authorizes the employer to transmit the amounts checked off to the exclusive bargaining agent, and

WHEREAS, the defendant Federation is now requiring, and defendant District is checking off, a fair share

contribution from the earnings of plaintiff Threlkeld, and the defendant Federation further proposes to require all other plaintiffs above named to contribute a fair share fee as of January 1, 1975, and,

WHEREAS, defendant District is obligated pursuant to M.S.A. §179.65(2) to check off the fair share contribution required or proposed to be required by defendant Federation and transmit the contributions to the Federation, and

WHEREAS, the validity of the required check off procedure described herein above is the essence of the controversy in the declaratory judgment action, and the determination of the amount to be checked off is the essence of the declaratory judgment action;

NOW, THEREFORE, it is hereby agreed that the statutory procedure as set out in these premises shall, as to the parties to the declaratory judgment action, be modified according to the terms of this agreement.

1. After this date, the defendant District shall check off from the earnings of the above named plaintiffs the fair share contribution required by the defendant Federation.

2. The District shall transmit the contributions checked off by it to an escrow savings account established at the Guarantee State Bank of Robbinsdale, 3700 West Broadway, Robbinsdale, Minneosta, signatories of which shall be Darel F. Swenson, 210 First National Bank Building, Wayzata, Minnesota, attorney for plaintiffs Association, Threlkeld, and Hanka, and Roger A. Peterson, 700 Title Insurance Building, Minneapolis, Minnesota, attorney for defendant Federation, who shall hold as escrow agents the fair share contributions deposited in said account according to the terms of this agreement. Upon transmission of the

checked off contributions to said bank, the District shall be relieved of any further obligation or responsibility relating to said contributions.

3. During the pendency of the declaratory judgment action referred to herein, under no circumstances shall the defendant District transmit the checked off contributions to the defendant Federation.

4. Within seven (7) days after this date, defendant Federation will transmit all fair share contributions deposited and currently in the Federation Fair Share account Guarantee State Bank of Robbinsdale, to the escrow savings account described in paragraph 2, hereinabove. Further, any fair share contributions received by the defendant Federation from a source other than the District transmitted to said Federation by or on behalf of any named or represented plaintiff, shall, within 7 days of receipt by the Federation, be transmitted to the escrow savings account described in paragraph 2 hereinabove.

5. The escrow agents shall not under any circumstances release the contributions deposited in the escrow account except upon their mutual written authorization signed by both such agents. Such mutual authorization must be granted after a final judicial determination has been made regarding the issues in the declaratory judgment action, and a court order entered relating to that determination, or congressional or legislative determination, or prior dismissal upon mutual agreement.

6. Upon execution of the mutual authorization referred to hereinabove, the contribution deposited in the escrow account shall be released by the escrow agents according to the following terms.

(a) In the event the final judgment and order in the declaratory judgment action favors the defendant Federation, the escrow agents shall release the contributions to said Federation.

(b) In the event the final judgment and order in the declaratory judgment action favors the plaintiffs, the escrow agents shall release the contributions as follows:

(1) One check shall be issued to the then president of the Association in an amount equal to the total of all contributions deposited in the escrow account from the earnings of the members of the Association.

(2) A second check shall be issued to plaintiff Hanka in an amount equal to the total of the contributions deposited in the escrow account from the earnings of Daniel Hanka and all employees of defendant District who are teachers but who are not members of any employee organization.

(3) A third check shall be issued to plaintiff Threlkeld, in an amount equal to the total of the contributions checked off from the earnings of these non-professional public employees who are not members of any employee organization.

Dated: Dec. 18, 1975

/s/ Bernard G. Zimpfer
Bernard G. Zimpfer
Attorney for defendant
Independent School
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/s/ Roger A. Peterson
Roger A. Peterson
Attorney for defendant
Robbinsdale Federation of
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/s/ Darel F. Swenson
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Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1975

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MARILYN THRELKELD, et al.,

Appellants,

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

BRIEF AMICUS CURIAE RAISING A QUESTION OF MOOTNESS FOR THE STATE OF MINNESOTA BY ITS ATTORNEY GENERAL WARREN SPANNAUS

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Appellee.

ON APPEAL FROM THE SUPREME COURT
OF MINNESOTA

BRIEF AMICUS CURIAE RAISING A QUESTION OF MOOTNESS FOR THE STATE OF MINNESOTA BY ITS ATTORNEY GENERAL WARREN SPANNAUS

This brief *amicus curiae* is filed by the State of Minnesota pursuant to Rule 42(4) of the Rules of this Court.

INTRODUCTION AND STATEMENT OF INTEREST

The instant appeal is from the judgment of the Supreme Court of Minnesota, entered on 11 February, 1976, which sustained against a federal constitutional due-process challenge * * * Minnesota Statutes Sections 179.65, subd. 2, 179.68, subds. 1, 3(1), and 179.76." (J.S. pp. 1, 3-4.)

The Jurisdictional Statement, dated 7 May, 1976, sets out those provisions as they stood "at the time of the decision of the Supreme Court of Minnesota". (J.S. pp. 4-5.)

The purposes of this brief *amicus curiae* are (1) to aid the Court in reaching an informed determination by bringing to its attention the amendments to Minn. St. 179.65, subd. 2, made by Minn. H. F. No. 2244 which became effective April 1, 1976 (cf. *Fusari v. Steinberg*, 419 U.S. 379, 387 n. 12 reh'g denied 420 U.S. 955); and (2) to demonstrate that here, as in *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 415, the appropriate disposition in light of the change in the underlying State statute is to "remand the case to the [Minnesota courts] with leave to the appellant sto amend their pleadings". (See also *Fusari, supra; White v. Regester*, 422 U.S. 945; *Hill v. Printing Industries of Gulf Coast*, 422 U.S. 937; and *Omaha National Bank v. Nebraskans for Independent Banking, Inc.*, —— U.S. ——, 44 Law Week 3700, No. 75-1382, June 7, 1976.)

STATEMENT OF THE CASE

As the Supreme Court of Minnesota explained, Minn. St. 179.65, subd. 2, the provision at the heart of this case

> "is a part of the Public Employees Labor Relations Act (PELRA), Minn. St. 179.61 to 179.77. The purpose behind PELRA is to 'promote orderly and constructive relationships between all public employers and their employees, subject however, to the paramount right of the citizens of this state to keep inviolate the guarantees for their health, education, safety and welfare.' §179.61. The legislature recognized that 'unique approaches to negotiations and resolutions of disputes between public employees and employers are necessary' to fulfill this purpose. Id. As a result, PELRA provides that any bargaining unit of employees may elect by majority vote an employee organization representative who shall then be certified as the 'exclusive representative of all employees in the unit' §179.67, subd. 12. The act contemplates that all employees in a given bargaining unit are entitled to share equally in the benefits obtained by the exclusive representative through negotiations or grievance proceedings. Consequently, the act provides in §179.65, subd. 2:
>
> "* * * [A]ll public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata

share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures." (J.S. pp. 2b-3b.)

The appellants are employees of the Independent School District 281, Robbinsdale, Minnesota, who are represented by the Robbinsdale Federation of Teachers Local 872 (a labor organization selected as the exclusive bargaining agent by the School District employees in a secret ballot election) who have chosen not to become members of that Union. Pursuant to the provisions of Minn. St. 179.65, subd. 2, Local 872 notified the School District that a fair share contribution should be checked off from the earnings of the non-member employees in the bargaining unit. This suit in the Minnesota courts seeking a determination as to "whether the fair share statute passes constitutional muster when neither it nor any of the other provisions of the PELRA specifically provides for a hearing prior to the imposition of the fair share fee upon non-members of" the Union followed.[1] (J.S. p. 5b); The trial court ruled that the fair share statute was unconstitutional (J.S. 1a-20a). The Supreme Court of Minnesota reversed (J.S. 1b-18b).

As noted above, after entry of the judgment but prior to the filing of the Jurisdictional statement, Minn. H. F. No. 2244, which makes the following amendments to the fair share statute became law:

[1] "An agreement was reached by the parties on December 18, 1974, which provided that all fair share funds withheld from the employees' paychecks would be placed in an escrow account pending final determination of this action." (J.S. 4b-5b.)

A bill for an act

relating to public employment labor relations; providing for determination of the fair share fee; providing for appeal of that determination; amending Minnesota Statutes 1976, Sections 179.63 by adding a subdivision; 179.65, Subdivision 2; 179.71, Subdivision 2; and 179.72, Subdivision 3.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1974, Section 179.63, is amended by adding a subdivision to read:

Subd. 19. "Fair share fee challenge" means any proceeding or action instituted by a public employee, a group of public employees, or any other person, to determine their rights and obligations with respect to the circumstances or the amount of a fair share fee assessment authorized by section 179.65, subdivision 2.

Sec. 2. Minnesota Statutes 1974, Section 179.65, Subdivision 2, is amended to read:

Subd. 2. Public employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations. Public employees in an appropriate unit shall have the right by secret ballot to designate an exclusive representative for the purpose of negotiating grievance procedures and the

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terms and conditions of employment for such employees with the employer of such unit. Except for employees included in section 179.63, subdivision 10, clause (c), who shall be exempt from contributing until January 1, 1975 only, all public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative, ~~and the employer upon notification by the exclusive representative of such employees shall be obligated to check off said fee from the earnings of the employee and transmit the same to the exclusive representative. In no instance shall the required contribution exceed a pro rata share of the specific expenses incurred for services rendered by the representative in relationship to negotiations and administration of grievance procedures,~~ in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefts financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues. The exclusive representative shall provide advance written notice of the amount of the fair share fee assessment to the director, the employer and to a list furnished by the employer of all employees within the unit. A challenge by an employee or by a person aggrieved by the assessment shall be filed in writing with the director, the public employer, and the exclusive representative within 30 days after receipt of the written notice. All challenges shall specify those portions of the assessment challenged and the reasons therefor but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. The employer

shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative 30 days after the written notice was provided, or, in the event a challenge is filed, the deductions for a fair share fee shall be held in escrow by the employer pending a decision by the director pursuant to section 3 of this act.

Sec. 3. Minnesota Statutes 1974, Section 179.71, Subdivision 2, is amended to read:

Subd. 2. The director shall accept and investigate all petitions for:

(a) certification or decertification as the exclusive representative of an appropriate unit;

(b) mediation services;

(c) any election or other voting procedures provided for in sections 175.61 to 179.77;

(d) certification to the board of arbitration ;

(e) to hear and decide all issues in a fair share fee challenge .

Sec. 4. Minnesota Statutes 1974, Section 179.72, Subdivision 3, is amended to read:

Subd. 3. In addition to the other powers and duties given it by law, the board has the following powers and duties:

(a) to hear and decide issues relating to the meaning of the terms "supervisory employee", "confidential employee", "essential employee" or "professional employee", as defined by section 179.63;

(b) to hear and decide appeals from determinations of the director relating to the appropriateness of a unit under section 179.67;

(c) to approve or disapprove the rules and regulations promulgated by the director under section 179.71,

subdivision 5, clause (g) ;

(d) to hear and decide on the record from determinations of the director relating to a fair share fee challenge decided under section 3 of this act .

Sec. 5. [EFFECTIVE DATE.] This act is effective the day following final enactment and sections 3 and 4 shall apply retroactively to any proceeding presently pending challenging the circumstances and amount of a fair share fee.

ARGUMENT

The central point of the Jurisdictional Statement is that:

[This appeal squarely presents the question of whether Local 872, acting as an exclusive-bargaining representative under color of the Minnesota Public Employment Labor Relations Act of 1971 may seize and expend portions of nonunion employees'[2] wages without affording them notice and a prior hearing of some kind on the validity of its claim that the monies seized constitute no more than the limited "pro rata share of the specific expenses incurred for services rendered by [Local 872] in relationship to negotiations and administration of grievance procedures", as required by Minnesota Statutes Section 179.65, subd. 2 at the time of the decision of the Minnesota Supreme Court.] (J.S. pp. 9-10.)

The flaws in the appellants' argument are fully yet succinctly exposed by the opinion of the Supreme Court of Minnesota. Nevertheless, in light of this Court's obligation to decide only present live controversies, it would be inappropriate to enter into a full dress proof that the Supreme Court of Minnesota was clearly correct in upholding the validity of the fair share statute before it. For, as noted above (pp. 6-7) subsequent to the "decision of the Minnesota Supreme Court", Minn. St. 179.65, subd. 2, has been amended to provide that no monies may be deducted from the wages of employees who are not members of the exclusive bargaining representative to satisfy the fair share requirement of the Minnesota law unless the employee has been "provide[d with] advance written notice of

[2] Technically, appellants' reference to nonunion employees is incorrect. The employees are those not members of the exclusive bargaining representative.

the amount of the fair share fee assessment". Moreover, in the event that a non-union employee files a challenge to the amount of the assessment, the employer may not transmit to the exclusive representative any of that employee's wages until the Director of the Bureau of Mediation Services determines that the amount in question is in fact, as the Minnesota law requires, a "fair share fee for services rendered by the exclusive representative in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative [and] in no event . . . exceed[s] 85 percent of the regular membership dues." Rather, the "deductions for a fair share fee shall be held in escrow by the employer" pending that decision.

In sum, the Minnesota law as it now stands assures that an exclusive representative "may [not] seize and expend portions of non-union employes' wages without affording them notice and prior hearing of some kind on the validity of its claim that the moneys seized constitute no more than" the "fair share fee for services rendered by the exclusive representative" permitted by Minnesota law. (Cf. J.S. pp. 9-10.)

This case is therefore governed by *Diffenderfer v. Central Baptist Church*, 404 U.S. 412. There a declaratory judgment action was filed challenging Florida Statutes §192.06(4) which authorized "a tax exemption for church property used, *inter alia*, as a commercial parking lot". The constitutionality of the State law was upheld in the trial court. After probable jurisdiction was noted in this Court, the Florida Legislature replaced §192.06(4) with a new section (Fla. Stat. §196.192(2)) which provided "that church property is exempt from taxation only if the property is used predominantly for religious purposes and only 'to the extent of the ratio that such predominant use

bears to the non-exempt use' ". The Court stated (*id* at 414-415):

> We must review the judgment of the District Court in light of Florida law as it now stands, not as it stood when the judgment below was entered. *Hall v. Beals*, 396 U.S. 45, 48 (1969); *United States v. Alabama*, 362 U.S. 602, 604 (1960); cf. *Thorpe v. Housing Authority*, 393 U.S. 268, 281-282 (1969); *Hines v. Davidowitz*, 312 U.S. 52, 60 (1941). It is clear that the church parking lot which was the subject of the taxpayers' complaint is no longer fully exempt from taxation. If, in fact, it can be demonstrated that the lot is predominantly used for nonreligious purposes, it will receive no exemption whatever. "The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall v. Beals, supra*, at 48.
>
> This is not a case that is "capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), nor is it the kind of case that may produce irreparable injury if not decided immediately, see, *e.g.*, *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Gray v. Sanders*, 372 U.S. 368 (1963). The only relief sought in the complaint was a declaratory judgment that the now repealed Fla. Stat. § 192.06 (4) is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed.
>
> Because it is possible that appellants may wish to amend their complaint so as to demonstrate that the repealed statute retains some continuing force or to attack the

newly enacted legislation, rather than remanding the case to the District Court for dismissal as is our usual practice when a case has become moot pending a decision by this Court, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 and n. 2 (1950), we vacate the judgment of the District Court and remand the case to the District Court with leave to the appellants to amend their pleadings. *Bryan v. Austin*, 354 U.S. 933 (1957).[3]

As we have shown, in this case as in *Diffenderfer*, the Court is being asked to pass on a statute that no longer exists and to do so even though the appellants will not be irreparably injured if this matter is returned to the Minnesota courts in a manner which permits a challenge to the present fair share statute if the appellants wish to make such a challenge and which permits the Minnesota Courts to dismiss if the case is or becomes moot.[4]

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[3] See also *Fusari v. Steinberg*, 419 U.S. 379. That case was an appeal in which this Court was asked to review "the determination that the Connecticut 'seated interview' procedures for assessing continued eligibility for unemployment compensation benefits violates the due process clause of the Fourteenth Amendment." This the Court declined so to do on the ground that:

"Our independent examination of Connecticut law reveals that the State significantly revised its unemployment compensation system following the District Court's decision. Some of the amendments are designed to ameliorate problems that the court identified. In these circumstances, we think it inappropriate to decide the issues tendered by the parties. We therefore vacate the decision of the District Court and remand for reconsideration in light of the intervening changes in Connecticut law." (Id. at 379-380.)

[4] §5 of H.F. 2244, *supra*, assures that these appellants will be accorded the procedural protections provided by the present Minnesota law and the escrow agreement reached between the parties assures that in the event the appellants eventually prevail they will be made financially whole. We advise the Court that the Director of the Bureau of Mediation Services is proceeding to assert the jurisdiction conferred upon him by Section 5 of the new legislation.

For the information of the Court we note that a recent decision of the Court of Appeals for the Eighth Circuit considered a broad attack upon the Minnesota Public Employee Labor Relations Act; however with respect to the challenge insofar as it rested upon the fair fee provisions the Court stated:

"Following the district court's order of December 22, 1975, the Minnesota Supreme Court held that the fair share provision of the PELRA was not violative of due process. *See Robbinsdale Education Ass'n v. Robbinsdale Federation of Teachers, Local 872*, 239 N.W.2d 437 (Minn. 1976). On March 31, 1976, the Minnesota Legislature enacted Minn. H. F. No. 2244, *amending* Minn. Stat. Ann. § 179.65(2), which significantly alters the manner in which fair share fees are assessed and possibly renders this claim moot."

Knight, et al. v. The Honorable Albert D. Alsop, District Judge, United States District Court for the District of Minnesota, Slip opinion No. 76-1051, May 17, 1976, at p. 9, n. 10.

CONCLUSION

For the above stated reasons in light of the intervening change of law the judgment of the Supreme Court of Minnesota should be vacated and the case remanded to the Minnesota Courts with leave to the appellants to amend their pleadings and for dismissal if the case is or becomes moot.

Respectfully submitted,

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